

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





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74-2092

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

NO. \_\_\_\_\_

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JO DAVIS MORTENSON,

PLAINTIFF-APPELLANT

VS

SYRACUSE UNIVERSITY, etc., et al.

DEFENDANT-APPELLEES

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APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF NEW YORK

---

APPELLANT'S BRIEF

JAMES I. MEYERSON  
1790 Broadway - 10th Floor  
New York, New York 10019  
(212) 245-2100

Attorney for Appellant



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APPELLANT'S BRIEF

## QUESTIONS PRESENTED

- I. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO CONSIDER EVIDENCE ON THE QUASI-PUBLIC NATURE OF SYRACUSE UNIVERSITY AND IN SUMMARILY DISMISSING THE ACTION THEREIN ON JURISDICTIONAL GROUNDS UNDER 28 U.S.C. §1343 (3) and (4) IN CONJUNCTION WITH 42 U.S.C. §1983 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ON THE GROUND THAT THE APPELLANT FAILED TO ASSERT A CLAIM THEREUNDER UPON WHICH RELIEF COULD BE GRANTED
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### STATEMENT OF THE CASE

This action was commenced by the Appellant, a woman, on December 7, 1973, with the filing of the Complaint with the Clerk of the United States District Court for the Northern District of New York; and it was subsequently served upon the Appellees by an agent of the Office of the United States Marshal for the Northern District of New York.

The action was brought, as a class action, to redress the maintenance and perpetuation of a pattern and practice of discrimination against women, solely because of their sex, in the hiring of women to, and the promotion and retention of women in, teaching positions on the faculty at Syracuse University, in contravention of the Fourteenth Amendment to the United States Constitution and the various acts of Congress which prohibit discrimination based on sex, to wit: 42 U.S.C. §§ 2000(e) et. seq., as amended (Title VII of the Civil Rights Act of 1964).

The Appellant commenced this action pursuant to a "Notice of Right to Sue" letter sent to her on September 27, 1973 and issued by the Equal Employment Opportunity Commission, Buffalo, New York, Lloyd G. Bell, District Director. See: Exhibit "A" in the Appendix to this Brief. Subsequently a second "Notice of Right to Sue" letter was issued by Mr. Bell on March 26, 1974, See: Exhibit "B" in the Appendix to this Brief, and the District Court was so advised.

In order to fully understand what substantive allegations in the Complaint fell within the District Court's jurisdiction under Title VII of the 1964 Civil Rights Act, as amended (42 U.S. C. §§ 2000(e) et seq.), as such jurisdiction was conferred upon the Court below pursuant to the "Notice of Right to Sue" letters which were issued by the Equal Employment Opportunity Commission on September 27, 1973, and on March 27, 1974, it is necessary to set forth herein the rather detailed course of action which the Appellant pursued in both the state and federal administrative agencies before the aforementioned "Notice of Right to Sue" letters were issued. See: Affidavits, in this regard, submitted to the Court below and made part of the Appendix to this Brief.

An understanding of the detailed course of action which the Appellant followed will lead to the inescapable conclusion that all of the allegations which she set forth in the Complaint, as well as all of the Appellees named therein, were subject to the "Notice of Right to Sue" letters from the Equal Employment Opportunity Commission.

In October, 1969, the Appellant was arbitrarily terminated from her position as an Assistant Professor in the English Department at Syracuse University effective June, 1971.

At the time of the notification of her termination in October, 1969, the Appellant had been an Assistant Professor in the English Department for three years.



At the time of the notification of her termination in October, 1969, the Appellant was the only potentially continuing full time female faculty member in the English Department at Syracuse University.

Furthermore, at the time of the notification of her termination in October, 1969, the Appellant's professional credentials and performance had not been properly evaluated according to the standards, practices and procedures of the Appellee University and the Department of English.

During the period from 1966 to 1973, it is believed, no male faculty member had ever been terminated after only three years of teaching service in the Department of English at the Appellee University with or without adherence to the evaluation standards, practices and procedures of the Appellee University and the Department of English.

Furthermore, during the period from 1966 to 1973, males in positions parallel to that of the Appellant had been repeatedly and continuously retained on the faculty in the English Department at Syracuse University notwithstanding that they possessed inferior academic qualifications than those possessed by the Appellant at the time of her termination.

During the period from 1967 through 1970 when the Appellant filed a Complaint with the New York State Division of Human Rights relating to her termination, no woman was offered or even seriously considered for a teaching position in the

Department of English at Syracuse University, although qualified women applied for positions and were available to fill the same.

During the period from 1967 through 1970 when the Appellant filed a Complaint with the New York State Division of Human Rights relating to her termination, many men were seriously and actively considered for positions in the Department of English at Syracuse University; and a dozen men were appointed to the Department faculty.

In October, 1970, the Tenure Committee of the Department of English at Syracuse University affirmed the Appellant's termination, effective June, 1971.

Prior to the October, 1970 affirmation of her termination by the Tenure Committee of the Department of English at Syracuse University, the Chairman of said Department, who is a standing member of said Tenure Committee, took the position that, because of the Appellant's marriage to a member of the Department of English, the Appellant was ineligible for employment in view of the University's general policy against nepotism.

At the time of the initial notification of termination in October, 1969, the Appellant was not married to a member of the Department of English at Syracuse University.

Furthermore, the Chairman of the Department held the view, prior to the affirmation in October, 1970, that the Appellant's termination was necessitated by budgetary plans which he had

formulated; and that the Tenure Committee's reconsideration of the Appellant's termination was, in sum, meaningless.

In December, 1970, the Appellant filed a Complaint with the New York State Division of Human Rights alleging that her termination effective June, 1971, was arbitrary, capricious and discriminatory against her, because of her sex, in violation of the Human Rights Law of the State of New York.

In April, 1971, pursuant to University procedures defined by the Faculty Manual, the Appellant filed a formal written request with the Academic Freedom, Tenure, and Professional Ethics Committee of the University Senate for consideration and redress of her grievance.

Formal hearings were not held by said Committee until the Spring of 1972.

In May, 1971, the Executive Committee of the Department and the Chairman of the Department, who is a standing member of the Executive Committee, declined to consider the Appellant's appointment to a faculty position in the Department of English at Syracuse University notwithstanding that there was a need for a person with the Appellant's qualifications to fill said position.

It is believed that the position still remains unfilled.

In April, 1971, the New York State Division of Human Rights found probable cause to exist in the Appellant's complaint.

After conciliation with the Appellee University failed, a public hearing was held in the State Division of Human Rights.

In November, 1972, Jack Sable, the Commissioner of the New York State Division of Human Rights held that the Appellee University had not discriminated against the Appellant in violation of the Human Rights Law of the State of New York and in view of the standards applied thereunder and the state court cases related thereto.

The standards applied under the Human Rights Law of the State of New York are different than the standards employed when measuring conduct under the United States Constitution and the various federal civil rights acts designed to protect the Appellant's right to be free from discrimination in employment because of her sex.

In December, 1972, the Appellant filed an appeal to the Appeals Board of the New York State Division of Human Rights from the decision of Commissioner Sable.

On January 19, 1973, a duly constituted hearing panel of the Academic Freedom, Tenure, and Professional Ethics Committee of the University Senate, issued a report after holding hearings in the Appellant's matter and pursuant to the grievance procedure which she instituted previously, as heretofore set forth.

In its findings, said Hearing Panel found that the Appellants's dismissal had violated appropriate and required University and Departmental procedures and was without adequate consideration in basis.

In spite of the findings of the Hearing Panel, the English Department of Syracuse University and officials of said Department and Syracuse University refused and continue to refuse to rectify their errors as set forth by the aforementioned Hearing Panel and as is required by the University grievance procedures.

The Chancellor of Syracuse University failed to implement the recommendation of the University Hearing Panel as is required by the Faculty Manual which defines the Appellant's contractual rights.

Furthermore, in spite of repeated written requests to have the University Hearing Panel's report presented to the Tenure Committee of the English Department at Syracuse University, since that report was handed down in January, 1973, the Chairman of said Department and various other members of the Department refused and continue to refuse to act on the valid request.

As late as April 30, 1973, the Department of English at Syracuse University refused to comply with the request to reconsider the Appellant's termination in view of the findings of the University Hearing Panel which found impropriety in the procedures employed by the English Department in terminating her, as well as in the substance of her termination.

On September 24, 1973, the Appellant filed a Complaint with the Regional Office of the Equal Employment Opportunity Commission in Buffalo, New York, alleging that her termination from her faculty position in the Department of English at Syracuse University, and the subsequent actions attendant thereto and related thereto, were arbitrary, capricious and discriminated against her because of her sex in violation of the 1964 Civil Rights Act as amended (42 U.S.C. §§ 2000(e) et seq.).

On September 27, 1973, Mr. Lloyd Bell, Regional Director of the Equal Employment Opportunity Commission Office in Buffalo, New York sent the Appellant a letter and a "Notice of Right to Sue" attached thereto.

On September 30, 1973, the Appellant sent to Mr. Lloyd Bell a letter of clarification regarding her previously filed complaint with the Equal Employment Opportunity Commission.

On October 3, 1973, the Appeal Board of the New York State Division of Human Rights heard oral argument relative to the Appellant's appeal from the adverse decision of Commissioner Jack Sable, as heretofore set forth.

The Appeal Board eventually affirmed the Commissioner's ruling, with a dissenting opinion.

On October 11, 1973, the Department of English at Syracuse University again refused to comply with a request to reconsider the Appellant's termination in view of the

finding of the University Hearing Panel which found impropriety in the proceedings employed by the English Department and the substance of her termination.

On October 18, 1973, the Chancellor of Syracuse University refused to act on the Hearing Panel's report as is required by the University procedures and regulations.

On December 3, 1973, Mr. Lloyd Bell, Regional Director of the Equal Employment Opportunity Commission Office in Buffalo, New York, wrote to the Appellant formally acknowledging the filing of her charges of employment discrimination with his office, as such charges were filed with said Commission pursuant to her letter of clarification and amendment of September 30, 1973.

In her letter to Mr. Bell, dated September 30, 1973, the Appellant specifically made reference to the fact that the Department of English at the Appellee University had refused the formal request for reconsideration of her termination, in view of the University Hearing Panel's report of January, 1973, as late as April 30, 1973.

The Appellee University seems to contend that the action (inaction) by the University as late as April 30, 1973 (and since that time) related to her reappointment to the English Department faculty at Syracuse University and was therefore related to a hiring practice rather than a termination practice.

However, if the Appellant had not been arbitrarily and discriminatorily separated from the University in June, 1971 and the University Hearing Panel had not found irregularity in the procedures and substance of her termination, in January, 1973, the action and inaction ostensibly related to her hiring would not have taken place in April, 1973 and again in October, 1973. In other words, reappointment, qua hiring, as the University is using it, is really a euphemism for correcting the Appellant's arbitrary irregular and discriminatory separation from the University; the action and inaction of the University in April, 1973 and October, 1973, in sum, deal with separation practices and not hiring practices and are inextricably attendant and related to the Appellant's termination from Syracuse University.

The Appellant's Complaint to the Equal Employment Opportunity Commission on September 24, 1973, as amended and clarified in her letter to Mr. Bell on September 30, 1973, was timely filed when considered in light of the April 30, 1973 action (inaction) by the Department of English at Syracuse University and officials thereof, which action (inaction) is intricately attendant to the arbitrary, irregular and discriminatory termination, itself, in June, 1971.



Thereafter, Mr. Bell issued another "Notice of Right to Sue" letter on March 27, 1974. Said letter was issued at the request of the Appellant's counsel in view of the oral argument which was being held before the District Court on the Appellees' Motion to Dismiss. The Court was advised at the oral argument that the Appellant's counsel had just spoken with Mr. Bell's office and that an unencumbered "Notice of Right to Sue" letter would be forthcoming. It was; and the District Court was formally advised.

Syracuse University and Joseph Bryant were Respondents in the State Division proceedings.

Syracuse University, a corporate educational entity, operates through its officers and employees.

Syracuse University, Chancellor Melvin Eggers and the English Department at Syracuse University were named Respondents in the Appellant's EEOC Complaint and the clarification (amendment) thereto.

All of the named Appellees are or were agents of Syracuse University for the purposes of this litigation and were subject to the jurisdiction of the District Court notwithstanding that all of them may not have been specifically encaptioned in either the State or federal administrative Complaints.

In view of the foregoing the District Court had proper jurisdiction over all of the allegations contained in the Appellant's Complaint, and all of the Appellees named therein,

said jurisdiction being conferred upon it pursuant to 42 U.S.C. §§ 2000(c), et. seq. (Title VII of the Civil Rights Act of 1964, as amended), the "Notice of Right to Sue" letters issued by the EEOC, thereunder.

After the Appellant filed her Complaint with the United States District Court for the Northern District of New York, the Honorable Edmund Port presiding, said Judge rescued himself from the case in view of his connection with the Appellee University (he served on the Board of Visitors of the Law College at said University). The case was then assigned to the Honorable James Foley, Chief Judge of the United States District Court for the Northern District of New York.

The Appellees, by and through their attorneys, made a Motion to Dismiss; and on May 13, 1974 the Court, after considering the Affidavits filed with it and hearing oral arguments but without taking evidence, dismissed the cause of action for lack of jurisdiction and for failure to state a claim upon which relief could be granted.

Believing that the District Court committed grievous error in dismissing the matter as it did, the Appellant filed a Notice of Appeal to this Court from the Memorandum, Decision and Order issued on May 13, 1974.

## ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO CONSIDER EVIDENCE ON THE QUASI-PUBLIC NATURE OF SYRACUSE UNIVERSITY AND IN SUMMARILY DISMISSING THE ACTION THEREIN ON JURISDICTIONAL GROUNDS UNDER 28 U.S.C. §1343 (3) and (4) IN CONJUNCTION WITH 42 U.S.C. §1983 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ON THE GROUND THAT THE APPELLANT FAILED TO ASSERT A CLAIM THEREUNDER UPON WHICH RELIEF COULD BE GRANTED

A. THE APPELLEE UNIVERSITY: STATE ACTION, THE FOURTEENTH AMENDMENT AND FEDERAL COURT JURISDICTION

The Civil Rights Act of 1871 (42 U.S.C. 1983) states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory [or part thereof], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

"The Fourteenth Amendment gave Congress the power to legislate against 'State action of every kind' having the effect of impairing federally guaranteed rights, Civil Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 27 L.Ed. 835 (1833), and Congress had exercised that power in §1983." Kletschka v. Driver, 411 F.2d 436, 447 (2nd Cir. 1969).

The Court in Kletschka, supra at pages 448-449, stated further:

"It was the evident purpose of §1983 to provide a remedy when federal rights have been violated through the use or misuse of a power derived from a state. Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)."

Moreover, ". . . informal, behind the scenes exertion of state authority is as much within the scope of §1983 as the more usual example of formal and open action leading to the denial of federal rights," Id. at page 447. "Several cases have held that action taken by private individuals were 'state action' violative of the Fourteenth Amendment because of the interaction of the private actors with state officials or policies, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963); Smith v. Hampton Training School for Nurses, 360 F.2d 577, 580 (4th Cir. 1966)." Driver, supra at page 448.

"The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, supra (109 U.S. at page 11) - whether the character of the State's involvement in an arbitrary discrimination is such that it should be held responsible for the discrimination." Peterson v. Greenville, 373 U.S. 244, 249, 83 S.Ct. 1119, 10 L.Ed.2d 323, 327 (1963) (Emphasis included).

In Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) the Supreme Court reversed the judgment of the Delaware Supreme Court which held that the lessee ( a private corporation) who operated a restaurant in an automobile parking building, owned and operated by an agency created by the State of Delaware to provide parking facilities, was acting in a purely private capacity and that the lessee's operation was primarily a restaurant and thus subject to the provision of a Delaware statute which does not compel the operator of a restaurant to give service to all persons seeking such. The Court said in this regard at page 725:

"The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been 'purely private' as to fall without the scope of the Fourteenth Amendment."

Because of the very "largeness of government, a multitude of relationships might fall within the Amendment's embrace;" and accordingly, it must be remembered that the susceptibility of a particular relationship and the alleged state action emanating therefrom can be determined "only in the framework of the peculiar facts or circumstances present." Burton v. Wilmington Parking Authority, supra at pages 725-726. See also: Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627, 637 (1972); O'Neill v. Grayson

County War Memorial Hospital, 472 F.2d 1140, 1143 (6th Cir. 1973); Male v. Crossroads Associates, 469 F.2d 616, 620 (2nd Cir. 1972).

Thus it has been held that "the private ownership or operation of a facility with a public interest does not automatically insulate it from the commands of the Fourteenth Amendment." Belk v. Chancellor of Washington University, 336 F.Supp. 45, 48 (E.D. Mo. 1970). See: Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1953); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

In the area of education, the distinction between private and public strikes a very delicate balance. See: Braden v. University of Pittsburgh, 477 F.2d 1, 6 (3rd. Cir. 1973).

In that regard, Judge J. Skelly Wright, sitting as a District Court Judge in Louisiana, recognized early on that the "administrators of a private college are performing a public function." He stated in that regard:

"Tulane argues that, even if there is no valid state law requiring segregation, it remains free to discriminate in admissions as it chooses. That proposition, of course, supposes that the acts of the University cannot be imputed to the state, but are entirely private deeds, exempt from the Equal Protection Clause.

At the outset, one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only sure foundation of freedom, [footnote omitted] without which no

republic can maintain itself in strength,  
[footnote omitted] institutions of learning are not things of purely private concern. The Supreme Court of the United States has noted that [i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Brown v. Board of Education of Topeka, supra, 347 U.S. 493, 74 S.Ct. 691, 98 L.Ed. 873."

\* \* \*

Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. [footnote omitted] Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, to the same extent as private persons who govern a company town, Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, or control a political party, Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, or run a city street car and bus service, Public Utilities Comm. v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Boman v. Birmingham Transit Company, 5 Cir., 280 F.2d.

Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how 'private' they may claim to be." (Emphasis added).

See: Guillory v. Administrators of Tulane University of Louisiana, 203 F.Supp. 855, 858-859 (E.D. La. 1962) See also: Belk v. Chancellor of Washington University, supra at page 48, where, Judge Harper stated:



"The pleadings do allege that Washington University operates as a result of a charter granted by the State of Missouri and that the defendant Chancellor Eliot is the chief executive of that private university. It is the opinion of this court that the acts of a private university can constitute 'state action' when said university is denying to its students their right to participate in the educational process. Education is a public function. The state granted a charter under which said university could operate as an educational institution. Hence, the private university's performance of public function could render its actions subject to constitutional restraints. (Emphasis added).

In holding that the actions of a private university can constitute 'state action', this court began from the principle that the private ownership or operation of a facility with a public interest does not automatically insulate it from the commands of the Fourteenth Amendment. The authority for this view has been well established in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 72 S.Ct. 813 96 L.Ed. 1068 (1952); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1953); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

The case of *Public Utilities Commission v. Pollak*, supra, illustrates that neither the operation of a privately-owned public utility corporation or a privately-owned public transit corporation is precluded from the operation of the constitution. In *Simkins v. Moses H. Cone Memorial Hospital*, supra, the court held that a private hospital was subject to the dictates of the constitution and stated, 323 F.2d 1, c. 968:

'And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the \*\*\* [institution actually chosen] could otherwise be private: the equal protection guarantee applies.'



In Marsh v. Alabama, supra, the court noted that a company-owned town could not deprive an individual of the rights that he is secured by the constitution. Judge Black in his opinion stated, 1.c.506, 66 S.Ct. 278:

'Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.'

Than, recognizing that "the pleadings of the plaintiffs with regard to the role of a private university in the educational process should be viewed in light of the [preceeding discussion]," Ibid, and citing with approval from Guillory, supra, Judge Harper acknowledged that "today, more than ever before, the area of education is a matter of the greatest public concern and interest," Ibid., and stated:

"The court in Guillory v. Administrators of Tulane University, 203 F.Supp. 855 (E.D. La. 1962), recognized the role of the private university in the public function of education, and rejected the contention that the acts of a private university cannot be imputed to the state. With regard to private institutions of higher learning, the court stated, 1.c. 858:

At the outset, one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only 'sure foundation \* \* \* of freedom,' 'without which no republic can maintain itself in strength,'

institutions of learning are not things of purely private concern. The Supreme Court of the United States has noted that [i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.' *Brown v. Board of Education of Topeka*, supra, 347 U.S. 493, 74 S.Ct. [686] 691, 98 L.Ed. 873.' (Emphasis added).

Although the *Guillory* case was concerned with racial discrimination, the court likened the acts of private administrators in the university to the actions of private persons who governed a company town in *Marsh v. State of Alabama*, supra, or who ran a streetcar and bus services as in *Public Utilities Commission v. Pollak*, supra. The court then stated, 203 F.Supp., at 859:

'Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes?' (Emphasis added).

The essential public function that private schools fulfill in education was again recognized in *Brown v. Mitchell*, supra. Although the court did not find the requisite 'state action' in a student disciplinary case, the court stated at 409 F.2d 596:

'We may concede, without deciding, that judged by the totality of its public functions this university may be likened to *Marsh* and *Logan Plaza* for the purpose of exercising First and Fourteenth Amendment rights in its public ways.'

'State action' cannot be determined by an exact formula. In fact, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, the court points out that the best approach to measuring state involvement in a case is through the inductive process of sifting facts and weighing circumstances. However, when in the area of state function and responsibility, the courts have recognized that the constitutional rights of its citizens must be protected.

This court holds that the conduct of the chief executive of a private university, in light of the public function of a private university in education, could amount to sufficient 'state action' in order to grant jurisdiction to this court. It now remains for the plaintiffs at the trial to prove such allegations as would confer the necessary jurisdiction. Accordingly, the motions of the defendant to dismiss this action for lack of jurisdiction and for failure to state a claim upon which relief can be granted are both overruled." (Emphasis added)

Id. at page 49<sup>1</sup>

In Braden v. University of Pittsburgh, supra, a case almost identical to the matter herein, an Assistant Professor brought an action, on her own behalf and on behalf of other women employed by the university in professional positions, against the university and its chancellor, alleging discrimination against women. The District Court dismissed the action on the ground of insufficient state involvement. See: Braden v. University of Pittsburgh, 343 F.Supp. 836 (W.D.Penn. 1972). In reversing, the Third Circuit Court of Appeals, by Judge Biggs, vacated the District Court judgment and remanded, stating in this regard that:

"The district judge filed a memorandum of law and held in substance that the . . . Commonwealth did not have sufficient connection with the University to be able to maintain the action under §1983 [footnote omitted].

The last issue tendered is, we believe, governed by Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45

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<sup>1</sup>See: Concurring opinion of Judge Gibbons in Braden, supra where he states:

"At least, whether the University of Pittsburgh is engaged in a state action, is a substantial factual question."

Id. at page 8.

(1961), and it must be decided whether the Commonwealth, in the language of Mr. Justice Clark 'has so far insinuated itself into a position of interdependence' with the University that it must be recognized as a joint participant in the challenged activity, i.e., discriminating against women. Stated conversely, can the activities of the University be considered to be so purely private as to fall outside the scope of the Fourteenth Amendment.

It would perhaps be possible for us to decide this last issue on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing. *Polk Co. v. Glover*, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6 (1938); *Bordens Farm Products v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281, concurring opinion, 293 U.S. 213, 55 S.Ct. 193, 79 L.Ed. 290 (1934); *Villa v. Van Schaick*, 299 U.S. 152, 57 S.Ct. 128, 81 L.Ed. 91 (1936). See also *Honeyman v. Hanan*, 300 U.S. 14, 25, 57 S.Ct. 350, 81 L.Ed. 476 (1937); *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 79 L.Ed. 1082 (1935); *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947); *DeBacker v. Brainard*, 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed.2d 148 (1969), and *Cowgill v. California*, 396 U.S. 371, 90 S.Ct. 613, 24 L.Ed.2d 590 (1970).

\* \* \*

We cannot decide this case in a semi-vacuum

\* \* \*

We do not have enough facts before us to determine the extent of the involvement of the Commonwealth in the conduct of the University, so that such conduct can be given its true significance. The issue, as Mr. Justice Clark said and as we have stated, is whether the Commonwealth has 'insinuated itself' into the affairs of

the University in such a way that the University's conduct cannot be considered to be so 'purely private' as to fall without the scope of the Fourteenth Amendment.' The balance here is a delicate one.

\* \* \*

This is an important case and we are entitled to a carefully prepared record after full hearing in the trial court and to the views of the trial court upon such a record. The judgment will be vacated and the case remanded with the directions to proceed in accordance with this opinion."

Id. at pages 4-6, 8. See also: Johnson v. University of Pittsburgh, 359 F.Supp. 1002, 1005-1006 (W.D. Penn., 1973), where the Court stated:

"After this case has been filed and after we had commenced taking the testimony of plaintiff in connection with her application for preliminary injunction the Court of Appeals for the Third Circuit entered its decision in Braden v. University of Pittsburgh, 5 FEP Cases 908 (No. 72-1220 slip opinion filed April 11, 1973) in which another sex discrimination case brought by a female assistant professor in the dental school which had been dismissed by another judge of this court was reversed and sent back for a full development of all the facts. The court directed that the facts be developed to determine whether the University of Pittsburgh was a State Institution or not and whether it was subject to the Civil Rights Act, 42 U.S.C. 1983.

Upon receipt of the opinion of the court in Braden, this court denied all motions to dismiss in the instant case, involving a female assistant professor in the School of Medicine, and ruled that the facts would have to be fully developed to determine whether or not the University of Pittsburgh was a State Institution and whether its officials would be subject to 42 U.S.C. 1983. The matter is presently before the court on a motion for preliminary injunction."  
(Emphasis added).

In Belk v. Chancellor of the University of Washington, supra, the Court made certain observations about the line of "private" university cases, involving student discipline, where "state" action was not held to exist because of "the desire of the court not to review the internal disciplinary affairs of a private university when the rules and procedures within the university are established." Speaking to the same Judge Harper said:

"The basic contention of the defendant Chancellor in his motion to dismiss for lack of jurisdiction is that there is no 'state action' alleged by the plaintiffs upon which this court can grant jurisdiction. It is axiomatic that the due process provision of the Fourteenth Amendment to the United States Constitution upon which this cause of action is based encompasses only 'state action,' and that the acts of private individuals will not be considered unless they are acting under color of state law. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

\* \* \*

In support of this contention that no sufficient 'state action' for jurisdiction exists, the defendant Chancellor cites several cases involving 'state action' in the private university. None of the factual situations in the cases cited by the defendant reflect the facts of the plaintiffs' pleadings. In the cases of Brown v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Torres v. Puerto Rico Junior College, 298 F.Supp. 458 (D.P.R. 1969); and Powe v. Miles, 407 F.2d 73 (2nd Cir. 1969); the respective courts found no sufficient 'state action' when the issue

concerned the power of a private university to suspend students for disciplinary infractions. Thus, the above cases are only authority for the principle that the power exercised by a private university in disciplining student members is not 'state action' under 42 U.S. C.A. §1983.

\* \* \*

Thus, the decision in Brown v. Mitchell supra, as in all the student disciplinary cases, is predicated upon the desire of the court not to review the internal disciplinary affairs of a private university when the rules and procedures within the university are established. Such is not the issue before this court here."

Id. at pages 46-47.

Not insignificantly, in Coleman v. Wagner, 429 F.2d. 1120 (2nd Cir. 1970), the Second Circuit, in reversing and remanding the case back to the District for further hearings, recognized that, even in the area of internal student discipline, a "meaningful state intrusion into the disciplinary policies of private colleges and universities," Id. at page 1125, can transform that which is ostensibly "private" conduct into "state action." In that regard, Judge Kaufman wrote for the Court:

"We are, however, cognizant of the possibility that the statute may have been intended, or may be applied to mean more than it purports to say. More specifically, section 6450 may be intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students. The Governor's



Memorandum approving section 6450 referred to an 'intolerable situation on the Cornell University Campus; and spoke of 'the urgent need for adequate plans for student-university relations.' 2 McKinney's 1969 Session Law, p. 2546 (emphasis added). Several other bills pending in the New York legislature while section 6450 was under consideration suggest that the statute was enacted in an atmosphere of hostility toward unruly student demonstrators and of resolve to make disruption costly for the participants. [footnote omitted] If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a 'hard-line' attitude toward student protesters, it would appear that New York has indeed 'undertaken to set policy for the control of demonstrations in all private universities' and should be held responsible for the implementation of this policy. *Powe v. Miles*, 407 F.2d 73, 81 (1968). Since we cannot resolve this question on the record before us, we conclude that the district court acted too hastily in dismissing the complaint and, consequently remand for a further hearing at which the plaintiffs may introduce evidence to establish that section 6450 represents a meaningful state intrusion into the disciplinary policies of private colleges and universities."

Judge Friendly concurred in the remand in Coleman, supra but indicated he would remand for a "consideration on the merits rather than for the elaborate preliminary inquiry" which the majority on the panel had directed. Limiting the application of Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968) which he authored, to Coleman, Judge Friendly seemed to hold that, in view of the existence of a state statute directing governing boards of "all colleges" to adopt rules and re-



gulations for maintaining public order, as a matter of law and "irrespective of what the inquiry directed by the majority may reveal," Coleman, supra at page 1126, the action complained of fell within the ambit of the Fourteenth Amendment. He stated at pages 1126-1127 that:

"I fully agree that the district court erred in dismissing the complaint for want of jurisdiction. However, although I recognize that the question of state action here is a close one and that resolution in plaintiffs' favor would not be compelled by the dictum in Powe v. Miles, 407 F.2d 73, 81 (2 Cir. 1968), even if that were binding, I would uphold their claim in that respect and would remand for consideration on the merits rather than for the elaborate preliminary inquiry which my brothers direct.

Until 1969 New York was content to leave the control of conduct on the campuses of private colleges to private colleges, save as all this might be governed by New York's general law of crime, tort and contract. We held in Powe v. Miles, supra, 407 F.2d at 79-82, that so long as New York thus stood aside, the enforcement of discipline by a private college was not state action despite New York's unusually extensive regulation of educational standards and the grant of state aid. Not satisfied with that situation, the 1969 Legislature moved in, as it had every right to do. It directed the governing boards of all colleges to 'adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof.' The colleges were further ordered to set forth in these regulations the penalties for violation, which 'shall include provisions for' 'suspension, expulsion or other appropriate disciplinary action.' Henceforth, it

can thus be forcefully argued, a private college in promulgating rules and regulations for the maintenance of order on the campus is exercising a power emanating from the legislature even though it could have acted on its own, as many in fact have done [footnote omitted]. This, as it seems to me, is the teaching of Judge Tuttle's well-known opinion in *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5 Cir. 1960), although the plaintiffs' case there was strengthened by the quick succession of repeal of a city ordinance and the promulgation of a Transit Company regulation, both requiring seating on the basis of race, and by the company's need of a franchise to use the city streets. (Emphasis added).

Two sets of considerations weigh with me in favor of a decision that the state action line has here been crossed, irrespective of what the inquiry directed by the majority may reveal.

Plainly one objective of the New York Legislation was to deter student disturbances by the clear announcement of rules of conduct and of the penalties for disobedience. That is fair enough; indeed it is a principle justification for our system of criminal sanctions. But if the state wishes the benefits of such deterrence in private colleges, must it not accept responsibility for preventing over-deterrence by excessive sanctions and lack of fair procedure for enforcement? Furthermore, and perhaps still more important, do not rules of private colleges framed in response to a state mandate have a significantly different symbolic appearance than rules formulated in the absence of such a statute? It is pertinent that the Rules and Regulations of Wagner College here at issue begin with a statement that a committee had met to prepare them 'in accordance with the newly enacted New York Public Law 129 - a, which required such a document,' then set out §6450 of the Education Law in full text, and include a copy of the required report to the Department of Education. The circulation of such a document fits rather precisely the sentence from

Griffin v. Maryland, 378 U.S. 130, 135, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964), that my brother Kaufman quotes. Furthermore, objections to the very existence of a detailed code would be met by the answer that one was state-compelled. When a state has gone so far in directing private action that citizens may reasonably believe this to have been taken at the state's instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice.

That, as it seems to me, must be the rationale of Burton v. Wilmington Parking Authority, 365, 6 L.Ed.2d 45 (1961). Although the Authority had not directed the Eagle Coffee Shoppe to discriminate against Blacks, it had placed the Shoppe in a position in which citizens could reasonably view the restaurant's acts as authorized by an agency of the state. Here, as in that case, 'the State has so far insinuated itself into a position of interdependence \*\*\*that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment,' 365 U.S. at 725, 81 S.Ct. at 862. It is arguable - indeed, I have argued -- that racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser amount of involvement may constitute 'state action' with respect to it than would be required in other contexts -- a consideration that might also serve to distinguish the Birmingham Transit case if a distinction were desired. But the ordinary citizen must find it puzzling enough that there is a constitutional limit on the regulation of student conduct at Buffalo and Stony Brook but none at Columbia and Cornell that courts should not be adverse to recognizing state action with respect to the latter when New York has departed, even in a rather minor way, from the hands-off policy it followed until 1969." (Emphasis added).

Noteworthy, is the acknowledgement by Judge Gibbons in Braden v. University of Pittsburgh, supra at page 8 (concurring opinion), a sex discrimination case, that, "in view of Pa. Stat. Ann. Tit. 24, §§2510-201 to 211 (Supp. 1972), there is state action as a matter of law."

Like race discrimination, which "is so peculiarly offensive and. . .so much the prime target of the Fourteenth Amendment," Coleman, Id. at page 1126, sex discrimination should be accorded the same recognition such that "a lesser degree of involvement may constitute 'state action' with respect to it then would be required in order contexts," Ibid. See: Roman v. Birmingham Transit Company, 280 F.2d 531 (5th Cir. 1960).

Appellant submits that, because of the explicit statutory scheme set forth in the New York State Education Law and the decisions of a New York State Court (discussed, infra) and in view of the particularly offensive nature of sex discrimination (like race discrimination), "the State has so far insinuated itself into a position of interdependence with the [Appellee University] that it must be recognized as a joint participant in the challenged activity," such that as a matter of law, the challenged conduct of the Appellee University and the officials thereof, "cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." Burton v. Wilmington Parking Authority, supra at page 725.

"The structure of higher education in New York is unique among the 50 states. A single administrative unit, the University of the State of New York, directed by a Board of Regents, has responsibility for all public and private higher education." (Emphasis added). Heinz Eulau and Harold Quinley, State Officials and Higher Education a General Report Prepared for the Carnegie Commission on Higher Education, 1970.

In that regard, the New York State Education Law (16 McKinney's Consolidated Laws §201) states:

"The corporation created in the year seventeen hundred and eighty-four under the name of The Regents of the University of the State of New York, is hereby continued under the University of the State of New York. Its object shall be to encourage and promote education, to visit and inspect its several institutions and departments, to distribute to or expand or administer for them such property and funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise, and to perform such other duties as may be intrusted to it. The said corporation shall have power to take, hold and administer real and personal property and the income thereof in trust for any educational, scientific, historical or other purpose within the jurisdiction of the regents of the University of the State of New York."

Continuing the law states:

"The institutions of the university (University of the State of New York) shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions as may be admitted to or incorporated by the university." (Emphasis added).

See: 16 McKinney's Consolidated Laws §214.

The law goes on to state in Section 218 (16 McKinney's Consolidated Laws §218) that:

"No corporation shall, under authority of any general act, extend its business to include establishing or carrying on any educational institution or work without the consent of the board of regents."  
(The board of regents is the governing body of the University of the State of New York).

Finally in Section 219 of the Education Law (16 McKinney's Consolidated Laws §219) it states that:

"The regents may, at any time, for sufficient cause, by an instrument under their seal and recorded in their office, change the name or alter, suspend or revoke the charter or incorporation of any institution which they might incorporate under section §216, if subject to their visitation or chartered or incorporated by the regents or under a general law." (Emphasis added).

In view of the foregoing one commentator has stated:

"Every private college in New York is chartered (accredited) by the Regents, whose approval must be obtained before any new degree can be awarded or major changes made in the curricula."

O'Neil, Private Universities and Public Law, 19 Buffalo Law Review 155, 185 (1970).

The history of higher education in New York reflects that there was no state system of public higher education until 1948 with the founding of SUNY. Up to that time there had been a string of small state-supported normal schools in the

rural areas of the state. It was not, however, until 1958 that SUNY began to attain its present form. Before that time, the state depended almost entirely on private colleges and universities to educate their young people after secondary school. It is within that framework that the relationship between Syracuse University and the State of New York must be viewed.

From the early days of the existence of this Country, states were expected to help support their private colleges and universities. This expectation dates back even prior to the Revolution, when the colonies helped to subsidize such universities as Harvard, Yale and Dartmouth. The system of state grants to private universities and colleges has its genesis in the Middle Ages in England, when the rulers endowed colleges, and then continued to help support them. The system still prevails in England in a modified form. However, the system died out in most of the original states in the United States, except for New York which maintained, virtually intact, the one that existed prior to the Revolution. During the years in which other states were founding land grant colleges and state university systems, the State of New York was enhancing and supporting the system of private colleges and universities which already existed therein. When SUNY was founded, it was added to a system already in existence.



Bearing in mind the history of a public system being added to the already existing private system, it is appropriate to examine some of the points District Judge Foley raised in his opinion. Citing from Jackson v. The Statler Hilton Foundation (slip op. 2741, 2750 [Decided Dec. 4, 1973; Revised April 5, 1974] quoted five criteria for ascertaining state involvement in private institutions; "(1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes governmental approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms."

In Ryan v. Hofstra, 324 N.Y.S. 2d 964 ( ) the Court, in a long and complex opinion, listed seven criteria for establishing the degree of government involvement in private institutions: (1) Dormitory Authority; (2) Governmental Grants; (3) State Scholar Incentive Awards to New York State residents; (4) Federal Construction Money; (5) Land (where obtained); (6) Tax Exemption; (7) Federal and State Funded Programs.



It should be pointed out before fitting the criteria to the facts herein, that the Appellant was never given an opportunity to present evidence in this respect or otherwise exercise discovery rights under the Federal Rules of Civil Procedure in order to develop the criteria which Judge Foley and the Ryan Court set forth.

1. In the case of Syracuse University, many dormitories have been built under the auspices of the New York State Dormitory Authority, (either fully or partially funded), to wit: Brewster-Boland-Brockway; Booth Garage; Syracuse University Research Corporation; Slocum Heights; Utica College and Sky Top. It is believed that about 30 million dollars are still outstanding. This list is not believed to be all-inclusive. According to the Dormitory Authorities Act, Eff. April 24, 1957, Section 1685, Exemptions from Taxation, it is stated: "It is hereby found, determined and declared that the creation of the Authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York, for the improvement of their education, welfare and prosperity, and is a public purpose, and that the dormitories of the Authority are an essential part of the state education system, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title, and the state of New York covenants with the holders of the bonds [what private entity can have tax-free bonds sold in its behalf?];

That the Authority shall be required to pay no taxes or assessments upon any of the property acquired by it or upon its activities in the operation and maintenance of such dormitories or any moneys, revenues, or other income received by the Authority and that the bonds of the Authority and the income therefrom shall at all times be exempt from taxation, except for transfer and estate taxes." This gives a brief statement of the purposes of the Authority.

The Dormitory Authority Act covers the building of dormitories for not only state owned, controlled and contracted schools, but for all private universities and colleges as well. Under that Authority, schools have the choice of having the dormitories built and operated by the Authority and leased to the college, or of having the money loaned to the college or university in question; then the institution builds its own buildings under the direction and supervision of the Authority, and subject to its rules and regulations. In the case of the Appellee University, the money was loaned to it by the Dormitory Authority the buildings constructed by the University.

2. Governmental Grants: In the Carnegie Commission Report on Federal Support to Colleges and Universities, 1972 there is a listing of the different types of institutions of higher education receiving Federal Government Support. The list is headed by the large research universities giving the doctoral degree; there are listed in order of amount and per-

centage of support given. Though universities are not given by name, and the data is given in averages and approximations, it is believed that Syracuse University fits into that first category which receives approximately 52 percent of its total operating budgets each year from the Federal Government.

New York State gives direct grants to private universities, known as "Bundy Money." These are given in direct proportion to the number of degrees granted each year (\$400 for each bachelor's degree and \$2400 for each graduate degree). There may be other state grants other than Bundy Money, as well, which the Appellant was foreclosed from ascertaining because of the District Court's premature dismissal of this action.

3. Scholar Incentive Awards. According to the Rules, Chapter II, Commissioner's Regulation, Subchapter I, Scholarships and Grants, Part 145, Regents Scholarships and Scholar Incentive Awards are made to New York State residents attending institutions of higher education in the State of New York. Any New York State resident is eligible to apply. Though Regents Scholarships are for academic excellence, the Scholar Incentive Awards are given for financial need.

At Syracuse University, out of a total enrollment of 19,355 for the fall semester of 1973, 13,560 students were New York State residents and eligible to apply. That number includes all students matriculated at Syracuse, graduate and under-graduate, full and part time and law students. Such is 70 percent of the total enrollment.

On the federal level, monies are funneled into the University treasury through among other things, the National Defense Educational Administration loan funds and scholarship awards.

In addition, there are other loan funds from both state and federal government, as well as direct tuition grants for various special groups of students (handicapped, those in health care fields, the dis-advantaged, etc.).

The University also obtains funds from the Federal Government and State Government to be used for work/study programs.

4. Federal Construction Money. It is believed that some buildings at Syracuse University have been financed through the Housing and Home Finance Agency, now the Department of Housing and Urban Development.

5. Land. The original Syracuse University tract, it is understood, was donated to the University. However, there have been some tracts that have come to the University through various urban development schemes; and it is understood that much land has come from other sources, as well, virtually all of it tax free. Again the Appellant was foreclosed from developing this information through discovery and presenting it to the District Court for its considered opinion rather than the summary disposition as it undertook herein.

6. Tax Exemption. All land coming under the Dormitory Authority is tax free, as well as the land used for educational purposes. All gifts to the University are tax exempt, i.e. money given directly in to general funds, endowments, manuscripts, rare books, art collections, etc.

7. Federal and State Funded Programs. The figure from the federal government may be as high as 52 percent of the total operating budget.

Though all of the above figures are believed to be as correct as possible, it should be realized that there is limited access on the part of the general public to much of the material. However the importance of them is to impress upon the Court the enormous complexity of the funding of a very large university, and the necessity, if a fair judgment is to be reached, of a thorough exploration of all of the facts.

Taking all things together, the question needs to be asked: Could Syracuse University Operate Without State and/or Federal Support and Tax Exempt Private Support? Appellant submits that it would not be possible, particularly at the present time.

The extent and intrusiveness of the governmental regulatory scheme:

The most important point in the operation of Syracuse University, an independent institution, is that, in the State of New York, independence does not extend to educational policy. The independent institutions of higher education in New York operate under the same laws as do the state controlled schools.

New York State has the most rigid quality control of any state in the nation. "The role of the Regents in higher education, simply stated, is to see that there is effective expansion and development of higher education in New York State. Explicitly,

this relates to the need to provide places and programs to meet the increased demand for education beyond high school. Implicit in the statement, and of greater concern to the Regents, is the maintenance of academic quality. . . . The Regents' quality control function is carried out in three separate but inter-related ways; chartering of institutions and registering of individual programs, visitation and evaluation of institutions, and setting degree requirements and licensing the professions." The Regents Statewide Plan for the Expansion and Development of Higher Education, 1968, published by the University of the State of New York, the State Education Department, Albany, New York, March, 1969, at page 1.

In Part 5, Section 52.2 in the Rules, under the authority of the Education Law:

"Standards for the Registration of Undergraduate and Graduate Curricula. . . .

"(c) Faculty Each member of the academic staff shall have demonstrated by his training, earned degrees, scholarship, experience, and by classroom performance or other evidence of teaching potential, his competence to offer the courses and discharge the other academic responsibilities which are assigned to him. . . ."

This section is administered in the following manner:

In Section 3.3 of the same Rules, it is stated that there is a Committee of the Board of Regents on Higher and Professional

Education appointed by the Chancellor of the University of the State of New York, State Education Department, of which the Chancellor and Vice Chancellor shall be ex officio members. This Committee on Higher and Professional Education is responsible for:

"Coordination of planning and development in higher and professional education, including State University, City University of New York and privately controlled institutions.

"Curriculum and supervision in higher and professional education."

"Examination, testing and student financial assistance in higher education, etc."

It is not disputed that the Appellee University most definitely has areas of private concern, but they are not under the rubric of education, the purpose for which the institution exists. Ryan v. Hofstra University, supra, sets forth the philosophy of the New York State Courts in this respect.

"...Private connotes ownership or possession by somebody. No private person owns Hofstra University or its property directly, nor even indirectly in the form of shares of stock. The university is replete with public interest, requirement and supervision. The University is in the most real comparable sense a public trust for the rendition of education. It is only for this reason that so much public wealth and effort has been supplied to it.

"A private university like Hofstra is an oligarchical form tending to be self-perpetuating. Its fundamental legal responsibilities are to the the public. Its existence and favored position can be justified only as a public stewardship.

Hofstra operates under a franchise from the New York State Board of Regents. Under Educational Law #219, the Board of Regents can move to dissolve the university corporation if it ceases its educational functions. There would then follow a distrubution of its net assets to such educational, religious, benevolent, charitable or similar purposes as the courts might approve, Educational Law #220."

Moreover, the Supreme Court of Westchester County Special Term, Rockland County, held recently in a matter involving Pace College, a privately endowed college, that Pace College, as:

"A New York College can scarcely regard itself as free to conduct its affairs in such a way as it may see fit, but must always work in close harmony with, and under the immediate and direct supervision of, State Officers."

"...[P]rivately endowed colleges in this State are, for all practical purposes, part and parcel of the State system of education mentioned in the statutes (e.g. Education Law, §207 and §305, subd. 1.)." (Emphasis added).

Board of Education of Union Free School District No. 2 vs. Pace College, 271 N.Y.S. 2d 773, 777 (S.Ct., Westchester County, Special Term Rockland County, 1966).

Continuing that Court stated:



"The degree of governmental regulation to which Pace is subject is at least as broad, and perhaps broader, than that applicable to a public utility.

\* \* \*

Pace's facilities, like those of all similar institutions in the State, are regarded as an integral part of the total of higher, educational facilities of the State available to meet the public need of all its citizens." (Emphasis added).

Id. at pages 777-778.

In reversing, on another basis,<sup>2</sup> the Appellate Division, Second Department, reinforced the public function of Pace College, ostensibly a private institution. Acting Presiding Justice Christ stated:

"Thus, contrary to the determination made at Special Term and urged upon us by the defendant Pace College and by the Association of Colleges and Universities of the State of New York, in their role as amicus curiae, we are persuaded that it is no defense to plaintiff's petition that Pace College performs an admittedly useful service to the community and one in which the public has such vital interest that the State undertakes to regulate and control closely those institutions which engage therein." (Emphasis added).

In a concurring opinion, Justice Benjamin stated:

"While in the instant case I agree that upon the facts the claim of Pace College is subordinate to that of the local school board, I would be unwilling to arrive at the same result were this taking to be of substantial portions of college campuses actually in operation, so as to interfere with such private colleges in our State as Vassar, Columbia, New York University, Cornell, or any of the other institutions of higher learning which are so essential to the public needs of our State, and indeed of the nation." (Emphasis added).

<sup>2</sup>The case involved a priority by a public entity in an eminent domain situation.

Appellant trusts that Justice Benjamin did not mean to slight the Appellee University and would see fit to lump Syracuse University with those colleges mentioned above; and would accord to it the same essentiality to the "public needs of our State and indeed of the nation."

Accordingly, the District <sup>Court</sup> was obligated, at least, to allow the Appellant, for herself and as a representative of the class of persons she purports to represent, the opportunity to submit evidence in support of her position, so that the District Court, "by sifting facts and weighing circumstances," Burton vs. Wilmington Parking Authority, supra at page 722, could have attributed the "true significance of the non obvious involvement of the State in private conduct," Ibid.; and could have determined whether, as a matter of fact and law, the state is a "symbiotic partner" in the alleged "private" discrimination thus transforming it into "state" discrimination actionable under 42 U.S.C. §1983 (the Civil Rights Act of 1871).<sup>3</sup>

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<sup>3</sup>The District Court should have had before it, as well, the interrelationship between the federal government and Syracuse University, financially and otherwise, so that to the fullest extent that Court could have ascertained governmental involvement, on all levels, in the Appellee University's affairs. As a matter of law, federal involvement in the affairs of private hospitals, through financial assistance alone, has been a sufficient enough nexus to allow those hospitals to come under attack for constitutionally impermissible actions and policies under 42 U.S.C. §1983

(cont'd.)

Certainly, the presence or absence of state appointed officials on a university's board of trustees or the presence or absence of statutory language expressing that a university is an instrumentality of the state is not sufficient enough, without more, for a court to declare that, as a matter of law, a particular university in a particular circumstance and under attack for certain constitutionally and statutorily impermissible policies and action, is not quasi-public in nature for jurisdictional purposes.

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<sup>3</sup>(the Civil Rights Act of 1871). See: Simkins v. Cone Men. Hospital, supra; Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D.Pa. 1970); Sam v. Ohio Valley General Hospital Assoc., 413 F.2d 826 (4th Cir. 1969); Sam v. Ohio Valley General Hospital Assoc., 257 F.Supp. 369 (D.C. Va. 1966); Holmes v. Silver Cross Hospital, 340 F.Supp. 125 (N.D. Ill. 1972). While the Appellant did not intend to rely solely upon federal financial involvement in the Appellee University's affairs, she submits that the District Court should have considered the same, along with state involvement, financial and otherwise, in order to show the truly quasi-public nature of the Appellee University.

This is particularly so in view of the public function which the Appellee University performs as a major international institution and in view of the subject matter challenged herein - sexually discriminatory employment policies and practices of the Appellee University against the Appellant specifically, and women, generally, who are seeking professional status and advancement therein in the University community, generally.

Such must be ascertained in the context of the full disclosure of the governmental inter-relationship with the ostensibly private institution, which, as such, can only be determined after the facts are laid before the Court.

As the Appellees aptly pointed out at page 13 of their Memorandum in Support of the Motion to Dismiss in the Court below:

"Thus, the critical question concerning state action in a private institution is, what control does the state have over the subject matter of the action?"

Such is clearly an issue of fact and should not be made solely an issue of law, as the Appellees would have made it notwithstanding their acknowledgment that it is not solely an issue of law. That Grafton v. Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1973) was ultimately decided in summary fashion does not negate the principle enunciated in Coleman v. Wagner College, supra, particularly in view of the discrimination subject matter of this litigation and in view of the paramount attention that such subject matter has received in the federal courts. See: Powe v. Miles, supra. Grafton did not concern itself with discrimination but rather with a situation where students, who had been expelled from Brooklyn Law College for ostensible scholastic deficiencies, claimed that they had been so expelled because of the exercise of their rights to free speech in violation of the First

Amendment to the United States Constitution. That Grafton was decided on a limited examination and evaluation of the State's involvement in the affairs of Brooklyn Law College is not sufficient reason for this Court to foreclose the Plaintiff from exposing all the facts possible, relative to the State's involvement in the affairs of Syracuse University, particularly as they relate to accreditation and how accreditation ultimately affects the employment policies and practices complained of herein.

Appellant herein, after oral argument to the District Court and submission of papers, introduced a supplementary affidavit in opposition to the Defendants' Motion to Dismiss pointing out that information respecting the faculty in the Department of English was being forwarded to the New York State Department of Education for its consideration. That fact, alone, as it stands before the District Court, gives credence to the Appellant's position herein that she should have had an opportunity to determine more fully just how much control the State of New York does, in fact, exercise over the Appellee University's employment practices, either subtly or overtly, through the accreditation power vested in the Board of Regents, the statutorily created body responsible for overseeing education, public and private, in the State of New York.

Furthermore, and in view of the dispute in fact apparent in the papers submitted herein to the Court below over exactly how much money is actually funneled into the University from the State Treasury, the Appellant should have had the opportunity to examine the facts more closely and expose them more fully to the District Court. In that regard, the Appellees set forth in their affidavits to the District Court only a superficial analysis of the budget minimizing, in fact, the amount of state monies the Appellee University is actually receiving. The sum so designated represents only the most obvious source of income. However, it is submitted that such obvious source is not the only source of state funds which the Appellee University is receiving; and it does not disclose what the Appellant submits are the more subtle and hidden sources of state funds, sources, Appellant submits, which when added to the relatively small sum acknowledged by the Appellee University, increase the amount of "state aid" to the University such that the Appellee University would be hard pressed to operate on an accredited level without the same, particularly in view of the ever increasing of costs of the operation of an institution of higher education. And of course, the Appellees' summary affidavit does not address itself at all to funds received from other levels of government which are very much necessary to the continuing viability of the University's operation.

In sum, the established law of this Circuit requires that this Court afford the Appellant herein the opportunity to ascertain and expose all the facts which are necessary in this discrimination lawsuit for the District Court to justly evaluate the role of the State of New York, directly and indirectly, in the operation of the Appellee University, generally, and the role of the State of New York, directly and indirectly in the employment policies and practices of the University, specifically. See: Coleman v. Wagner, supra; Powe v. Miles, supra, as well as the discussion heretofore.

In this important public interest case, the Appellant, for herself and for the members of the class of persons she purports to represent, was entitled to a carefully prepared record after a full hearing in the District Court so as to have allowed that Court to properly determine the extent of the involvement of the State of New York in the conduct of the Appellee University, "so that such conduct can be given its true significance."

This is particularly so where, as here, the Appellees merely denied the Appellant's allegations, in this regard, in a conclusory manner and did not submit any facts to dispute the Appellant's well-plead claims of a significant and substantial relationship between the State of New York and the Appellee University; for in disposing of a motion to dismiss, the District Court was obligated to view the



allegations of the complaint in a light most favorable to the Appellant, See: Fuhrer v. Fuhrer, 292 F.2d 140, 144 (7th Cir. 1961); Cranston Print Works Co. v. Public Services Co., 291 F.2d 638, 639-640 (4th Cir. 1961); and was obligated to accept its facts as true unless otherwise specifically contradicted in an appropriate evidentiary fashion.

On the other hand and in view of the latter discussion encompassed in this argument, the District Court could have held that, as a matter of law, there is state action herein, thereby conferring jurisdiction on the Court below pursuant to 28 U.S.C. §1343 (3) (4) in conjunction with 42 U.S.C. §1983 (the Civil Rights Act of 1871) and the Fourteenth Amendment to the United States Constitution. The District Court's failure to do either of the aforementioned was reversible error.



B. A CAUSE OF ACTION AND  
CLAIM UPON WHICH RE-  
LIEF CAN BE GRANTED:  
THE FOURTEENTH AMEND-  
MENT AND SEX DISCRI-  
MINATION

Assuming the existence of the symbiotic relationship between the State of New York and the Defendant University and the attendant transformation from what is ostensibly private action to state action, either as a matter of law ab initio or as a matter of law, "after the fact," there can be little doubt that the conduct, if discriminatory against women, is actionable and a proper subject of a claim redressable in a Federal Court under the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. §1983).

The recent trend of decision under the Equal Protection Clause has been to invalidate sex classifications unless supported by factual evidence. Buckley v. Coyle Public School System, 476 F. 2d 92 (10th Cir. 1973); Reed v. Reed, 401 U.S. 934, 92 S. Ct. 251, 30 L.Ed.2d.255(1971); Lafleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir., 1972), Affirmed \_\_U.S. \_\_\_\_, 94S.Ct. 791, 39L.Ed.2d 52 (1973); Heath v. Westerville Board of Education, 345 F. Supp. 501 (S.D. Ohio, 1972); Bravo v. Board of Education of the City of Chicago, \_\_\_\_ F. Supp. \_\_\_\_ (N.D. 111 July 7, 1972), reported in 4 FEP Cases 994; Williams

v. San Francisco Unified School System, 340 F. Supp. 438 (N.D. California 1972); Seidenberg v. McSorley's Old Ale House, 317 F. Supp. 539 (S.D. N.Y. 1970); Kirstein v. Rector and Visitors of Va., 309 F. Supp. 184 (E.D. Va. 1970); Mollere v. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969); Karczewski v. Baltimore and Ohio R.R. Co., 274 F. Supp. 160 (N.D. Ill. 1967); White v. Crook 251 F. Supp. 401 (M.D. Ala. 1966).

It is true that "... the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 6 L.Ed.2d 393 (1960). At the same time, however:

"The Equal Protection Clause ... does... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."

Reed v. Reed, supra at page 229. In Reed, the Supreme Court in holding that an Idaho statute, which gave a mandatory preference for appointment as administrator to a male applicant over a female applicant otherwise equally qualified and within the same entitlement class under the Probate Code, violated the equal protection clause of the Fourteenth Amendment, reiterated its previous pronouncement that:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. vs. Virginia, 243 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989, 990 (1920)."

The same is true, of course, of the policies, practices and actions of state officials or persons who, because of their symbiotic relationship with the state, are cloaked and act with the authority of state officials.

Speaking to the vitality of a cause of action claiming the denial of Equal Protection of the law because of sex discrimination and seeking redress through the Fourteenth Amendment to the United States Constitution, the United States District Court for the Eastern District of Virginia stated in Kirstein v. Rector and Visitors of University of Virginia, supra at page 187, that:

"The plain effect of the Equal Protection Clause of the Fourteenth Amendment is 'to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens - including women.' White v. Crook, 251 F.Supp. 401, 408 (M.D. Ala. 1966) (holding that women may not be denied the right to jury service). Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969) (women's right to jury service); United States ex rel. Robinson v. York, 281 F.Supp. 8 (D. Conn. 1968) (women's right to sentencing on equal basis with men)."

Appellant's cause of action, herein, in effect, seeks to implement the proposition set forth in Rosenfeld v. Southern Pacific Company, 444 F.2d 1219, 1225 (9th Cir. 1971), to wit: that "equality of footing is established only if employees [or potential employees] otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity" and objective criteria. The policies, practices and actions complained of herein, rather than establishing "equality of footing" among employees and potential employees (male and female) on the faculty at the Appellee University, reinforce arbitrary, capricious and subjective assumptions and traditions which have had the intent and effect of discriminating against women disparately as a class and which thereby deny "desirable positions to a great many women [including the Appellant] [who] are perfectly capable of performing the duties involved." Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228, 236 (5th Cir. 1969).

In view of the foregoing and assuming that the Appellee University is quasi-public for the purposes of this action (as the District Court should have assumed on the well-plead facts and in view of the discovery yet to be taken in order to support that assumption) the Court below committed reversible error in dismissing the action for failure to state a claim upon which relief can be granted.

II. THIS ACTION IS APPROPRIATELY  
CLASS IN NATURE AND THE DIS-  
TRICT COURT COMMITTED REVER-  
SIBLE ERROR IN DISMISSING IT  
AS SUCH

As the Court of Appeals for the Seventh Circuit said in  
Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir.  
1969):

"A suit for violation of Title VII is  
necessarily a class action as the evil  
sought to be ended is discrimination  
on the basis of a class characteristic,  
i.e., race, sex, religion or national  
origin." (Emphasis added).

See also: Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th  
Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496,  
499 (5th Cir. 1968).

In Kansas City, Mo. v. Williams, 205 F.2d 47, 52 (8th  
Cir. 1953), Cert. denied 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed.  
351 (1953), the Court addressed itself to the appropriateness  
of a class action suit where civil rights, race, and the Four-  
teenth Amendment come together. It said:

"Violations of the Fourteenth Amendment are  
of course violations of individual or per-  
sonal rights, but where they are committed  
on a class basis or as a group policy, such  
as discrimination generally because of race,  
they are no less entitled to be made the  
subject of class actions and class adjudica-  
tion under Rule 23, Federal Rules of Civil  
Procedure. 28 U.S.C.A. than are other several  
rights. And the District Courts where the  
question has so arisen, have practically  
unanimously so recognized. See, e.g., Gon-  
zales v. Sheehy, D.C. Ariz., 96 F.Supp. 1004;  
Wilson v. Board of Sup'rs of La., State  
University, etc., et al., D.C. La., 92 F.Supp.

986; Johnson v. Board of Trustees of University of Kentucky, D.C., E.D. Ky., 83 F.Supp. 707; Davis v. Cook, D.C., N.D. 80 F.Supp. 443; Lopez v. Seccombe, D.C., S.D. Cal., 71 F.Supp. 769 -- to give but a few examples. See also Alston v. School Board of City of Norfolk, 4 Cir. 112 F.2d 992, 997, 130 A.L.R. 1506; City of Birmingham v. Monk, 5 Cir., 185 F.2d 859." (Emphasis added).

See also: Lucy v. Adams, 134 F.Supp. 235, 238, 239 (N.D. Alabama, 1955), Affirmed 228 F.2d 619 (5th Cir. 1955), Cert. denied 351 U.S. 931, 76 S.Ct. 790, 100 L.Ed. 1460.

Ever since the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 837 (1954), which itself was a class action, the courts have consistently reiterated that class action under Rule 23 are highly effective, appropriate, and even necessary methods of redressing racial discrimination. See: Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) (employment); Potts v. Flax 313 F.2d 284 (5th Cir. 1963) (education); Cypress v. Newport News General and Non-sectarian Hospital Assn., 375 F.2d 648 (4th Cir. 1967) (hospital staff); Sharp v. Lucky, 252 F.2d 910 (5th Cir. 1958) (voting); Gautereaux v. Chicago Housing Authority, 265 F.Supp. 582 (N.D. 111 1967) (housing); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir. 1968) (housing).

In Sharp v. Lucky, supra at page 913, the Court said:



"...[W]e think it quite clear that the complaint alleged a proper case for a class action. Since, as we have stated, this is not to be construed as a suit for interference with plaintiff Sharp's rights as a lawyer, but as a Negro citizen. He may properly sue on behalf of all other Negro citizens, since they all have identity or interest in having access to the public offices of the Parish on a non-segregated basis. Rule 23 F.R.C.P.; c.f., City of St. Petersburg v. Alsup [5 Cir. 238 F.2d 830]; Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, certiorari denied 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436." (Emphasis added).

In Potts v. Flax, supra at pages 288-289, a school desegregation case, the Court in addressing itself to the viability of a class action therein, stated:

"Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial discrimination. It sought obliteration of that policy of system-wide racial discrimination. In various ways this was sought through suitable declaratory orders and injunctions against any rule, regulation, custom or practice having any such consequences. The case therefore had those elements which are sometimes suggested as a distinction between those which are, or are not, appropriate as a class suit brought to vindicate constitutionally guaranteed civil rights. The pleaded reason for challenging the class suit was therefore, unfounded." (Emphasis added).

See also: Orleans Parish School Board v. Bush, 242 F.2d 156, 165 (5th Cir. 1957), Cert.denied 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436 (1957); Avery v. Wichita Falls Independent School District, 241 F.2d 230, 232 (5th Cir. 1957), Cert.

denied 353 U.S. 938, 77 S.Ct. 816, 1 L.Ed.2d 761 (1957); Frasier v. Board of Trustees, 134 F.Supp. 589, 593 (M.D.N.C. 1955), Affirmed per curiam 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956); Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107, 109 (4th Cir. 1962), Cert. denied 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963); Manning v. Board of Public Instruction, 277 F.2d 370, 375, (5th Cir. 1960); Green v. School Board of the City of Roanoke, Virginia, 304 F.2d 118, 124 (4th Cir. 1962).

Moreover, the Court, in Potts, supra, indicated that should it refuse to recognize the class nature of the action it would have, in effect, been contributing "actively to the class discrimination proscribed" by its previous school desegregation decisions. It said in that regard at page 289:

"...[T]o require a school system to admit the specific successful plaintiff Negro child while others having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to class discrimination. . . ." (Emphasis added).

In Jenkins v. United States Gas Corporation, 400 F.2d 28, 34 (5th Cir. 1968), a class action by a black plaintiff to enjoin violations of the Civil Rights Act, the Court said:

"Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in the plaintiffs' behalf, the result would be the incongruous one of the Court -- a Federal Court, no less -- itself being the instrument of racial discrimination which brings to mind our rejection of like arguments and results in Potts v. Flax, 5 Cir., 1963, 313 F.2d 284, 289." (Emphasis added).



In Hall v. Werthan Bag Corporation, 251 F.Supp. 184, 186 (M.D. Tenn., 1966), the Court stated:

"Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. (Emphasis added).

\* \* \*

"...[A]lthough the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class."

See generally: Jenkins v. United Gas Corporation, supra, f.n. 15 at pages 34-35; Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission, 418 F.2d 355, 358 (6th Cir. 1969); Johnson v. Georgia Highway Express, Inc., supra.

In Newman v. Piggie Park Enterprises, 390 U.S. 400, 401 88 S.Ct. 964, 19 L.Ed.2d 1263, 1265, the Supreme Court said in regard to the nature of suits brought under the Civil Rights Act of 1964:

"A Title 11 suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not only for himself alone, but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority.

See also: Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 499 (5th Cir. 1968):

"Racial discrimination is by definition class discrimination, and to require a multiplicity of separate identical charges. . . as a prerequisite to relief through resort to the Court would tend to frustrate our system of justice and order." (Emphasis added).

Clearly the same principals and logic, discussed heretofore with respect to cases involving discrimination based on race, apply to the instant case. The very nature of the rights which the Appellant is seeking to vindicate herein requires that the decree run to the benefit not only of the individually named Appellant but also for persons similarly situated.

This action was brought to obtain redress against the Appellee University for the maintenance and perpetuation of a pattern and practice of discrimination against women, solely because of their sex, in the hiring of women to and the promotion of women in teaching positions on the faculty at Syracuse University, in contravention of the Fourteenth Amendment to the United States Constitution and the various acts of Congress which prohibit discrimination based on sex. Appellant Mortenson brought this action on behalf of herself and on behalf of all other women who, because of their sex, and solely because of their sex, have been, are being, and will continue to be denied access to and promotions in faculty positions at Syracuse University in contravention of the United States Constitution and the various acts of Congress which prohibit discrimination based on sex.

In applying the afore-stated principles, it is apparent that the policies, practices and actions complained of herein are alleged to be carried out on a "group-wide" basis; and that while an individual may obtain redress on an individual basis for the violation of a personal right, the group sought to be represented (in this case women), of which the individually named Appellant is a part, is no less entitled to relief against the allegedly discriminatory policies, practices and actions of the Appellee University. In other words, the individual rights herein are part and parcel of the group rights, and the suit is directed at the obliteration of the system-wide sex discrimination to the benefit of the Appellant, specifically, and women, generally.

In fact, to grant relief to the individual Appellant, herein, without according the same on a group-wide basis would be for the Court, itself, to contribute actively to class discrimination.

In short, sex discrimination and the policies and practices of an institution in effecting the same, like race discrimination, is by definition class discrimination; if it exists it presents a question of fact common to all the members of the class.

Moreover, to bring all of the potential class members before the Court would be impossible, although Appellant need only show the impracticability and not the impossibility of so doing. 3B MOORE, §23.05 at 23-290. Certainly, a joinder of all

of the members of Appellant's class would be impracticable and would result in a burden on the administration of justice which the mechanics of Rule 23 were designed to avoid. 3B MOORE, §23.02 [1].

Finally, it cannot be seriously doubted that the Appellant, as representative parties, will fairly and adequately, under subdivision (a) (4), represent and protect the interests of the class. Whether the named Appellant offers adequate representation depends on the facts of the particular case. 3B MOORE, §23.07 at 23-351, 352. In the instant case, the interests of the other members of the class and are in no way adverse or antagonistic to the interests of those whom the individually named Appellant seeks to represent. Further, Appellant, for herself and through her attorney, shall prosecute the action as vigorously on behalf of the class as they have done thus far on behalf of the named Appellant. See: Mersay v. First Republic Corp., 43 F.R.D. 465, 469 (S.C.N.Y. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968); Herbst v. Able, 47 F.R.D. 11, 15 (S.C. N.Y. 1969). Cf. Schy v. The Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970), Cert. denied, 400 U.S. 826 (1970).

Thus, Appellant submits that all the requirements of Rule 23 (a) are met, and all that remains to be considered is whether the elements of subdivision (b) (2) have been satisfied.

In order for a class action to be maintained not only must the prerequisites of subdivision (a) of Rule 23 be satisfied but, in addition, one of the standards of subdivision (b) must also be met. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 561 (2nd Cir. 1968); Berland v. Mack, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); Barron and Holtzoff, Federal Practice and Procedure, 1970 Pocket Part, §562, p. 65. In Boughton v. Brewer, 298 F.Supp. 260 (N.D. Alabama, 1969) a civil rights action was instituted, challenging the vagrancy statute of the State of Alabama. Addressing itself to the "class action" aspects of the case, the Court said at page 267:

"To be maintainable as a class action, a suit must meet all of the requirements set out in section 23 (a) [of the Federal Rules of Civil Procedure] and also fall within the ambit of at least one subsection of Section 23 (b)."

It is Appellant's contention that this case falls squarely within subsection (b) (2) of Rule 23, thereby satisfying the second requirement for the maintenance of a class action. Subsection (b) (2) provides:

"(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . ."

\* \* \*

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole: . . ."



The Advisory Committee, as drafters of the Federal Rules Civil Procedure, believed that subdivision (b) (2) of Rule 23 was particularly appropriate "in the civil rights field where the party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Note to Rule 23 (b) (2), quoted in Moore's Federal Practice Rules Pamphlet with Comments, as amended 1968, p. 536. The Committee note states in this regard:

"Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect, or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

\* \* \*

"Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), Cert. denied, 377 U.S. 972 (1962); *Brunso. v. Board of Trustees of School District No. 1 Clarendon Cty., S.C.*, 311 F.2d 107 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), Cert. denied, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.D. 1955), (3-judge court), aff'd. 350 U.S. 979 (1956)." Id.

See: United States v. Cantrell, 307 F.Supp. 259, 261, f.n. 1 (E.D. Louisiana, 1969); James v. Goldberg, 302 F.Supp. 478, 481 (S.D.N.Y., 1969). See also: Barron and Holtzoff, supra, at page 69:

"Rule 23 (b) (2) permits a class action where the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Its primary utility will be in civil rights cases." (Emphasis added).

In this "Civil rights action," seeking to obtain "equality of footing for women," the actions directed against the Appellant, as a woman, are actions based on policies and practices which have a general application to all women; to wit: they are arbitrary, capricious and sexually discriminatory; and notwithstanding that the policies and practices have taken effect as to only a few members of the class and/or may vary in the actual effect thereto, the injunctive and/or declaratory relief is appropriate not only to the named Appellant but to the class as a whole.

In fact, smallness in number of actual Plaintiffs or other persons who may have been aggrieved by the challenged policies and practices does not negate the viability of a class action for:

"it is impossible to determine how many black persons [women] may have been discouraged from applying because of the obstacles placed in the way of plaintiff and others. The fact that only a small number have actually sought relief is not determinative. Katz v. Carte Blanche Corp., 52 F.R.D. 510, 515 (W.D. Pa. 1971)."

See: Green v. The City of Glen Cove, \_\_\_\_ F.Supp. \_\_\_\_ (E.D.N.Y., January 11, 1972).

In a recent sex discrimination case brought under Title VII, Judge Lasker, sitting in the Southern District of New York, addressed himself to many of the points raised by the Appellees in the Court / <sup>below.</sup> After holding the action which was being prosecuted by a female law student against a rather large and prestigious New York City law firm, to be a class action, Judge Lasker stated:

"Kohn seeks a determination that the suit may proceed as a class action on behalf of all women qualified for legal positions at Royall, Koegel and Wells who have been or would be denied employment because of their sex. (Complaint, III, 3.) Since the requirements of Rule 23 (a) and (b) (2) (Fed. R. Civ. P.) are satisfied, the motion is granted."

"A. Numerosity (Rule 23 (a) (1)). - Kohn claims that the putative class contains approximately 500 women who are recent graduates of or are currently enrolled in the nation's leading law schools or are members of the bar admitted to practice in the New York area.

The firm maintains that this definition is too broad and that, properly defined, the class is not too numerous to permit joinder. In support of this proposition, it advances several arguments.



First, the firm contends that since it extends offers to only 2.6% of all applicants, if the entire proposed class actually applied, only 13 of its members could complain of failure to receive an offer. A corollary to this argument is that only rejected women applicants who can be shown to have been superior to the males hired in their place are proper members of the class.

The argument misses the point. The intended effect of Title VII is to give each applicant an equal opportunity to be hired. To the extent that an employer discriminates on the basis of a forbidden classification, he reduces the probability that any single member of that class will find employment with him. Discrimination makes competition for the limited number of positions more difficult for the entire class by use of a tougher standard as to all of its members. As a result, all applicants handicapped by the double standard have less opportunity for employment than persons not discriminated against. Accordingly, all are harmed, although not all could have been employed.

Second, the firm contends that the class cannot include women who will seek employment with it in the future. The case relied on, *Gerstle v. Continental Airlines, Inc.*, [2 EPD ¶10,273] 50 F.R.D. 213 (D. Colo. 1970), is inapposite. There, the employer eliminated the discriminatory rule before commencement of the suit, and so no case or controversy could exist as to present and future employees. *Id.* at 217. Here, on the contrary, the discriminatory practice is alleged to be continuing, and the class properly includes future as well as past applicants who will be affected by it. *Bios v. Enterprise Association Steamfitters, Local 638*, 3 EPD ¶8812 (S.D.N.Y. 1971); *Black v. Central Motor Lines, Inc.*, 1 EPD ¶9956 (W.D.N.C. 1968) [footnote omitted].

Accordingly, although Kohn's figure of 500, representing the labor pool from which the firm must draw its female employees, may be overbroad in that not all persons in the pool are necessarily interested in employment with the firm, it is reasonable to conclude that the number of persons who are interested is sufficiently large to justify class treatment. In 1970 alone (the year that Kohn applied for a position), the firm received 78 applications from women. (Affidavit of Robert Lindgren opposing motion for a class action determination, par. 20.) Since the firm is receiving an increasing number of applications from women (Id. at par. 22), it is clear that the number of women applicants eligible for membership in the class exceed that which would permit joinder of all members. *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2nd Cir. 1972) (district court ordered to allow class action for a class of seventy).

B. Common Question of Law of Fact (Rule 23 (a) ( )) - The firm contends that there are no questions of law or fact common to the class or, alternatively, that Kohn's claims are not typical of the claims of the class, because [s]ince the process of selection is and must be to a great extent selective, the number of variables involved is infinite and the questions of fact involved are entirely unique in each case. (Defendant's Memorandum of Law opposing class action motion at 14.)

There is no doubt that hiring a professional requires weighing many subjective factors contributing to the applicant's qualifications as a whole, above and beyond the more objective academic qualifications. We cannot agree, however, that this fact immunizes discriminatory practices in professional fields from attack on a class basis. See *Hecht v. Cooperative for American Relief Everywhere, Inc.*, [5 EPD [8059] 351] F.Supp. 305 (S.C.N.Y. 1972), which involved female employees at the executive level. The common question in both professional and non-professional employment situations is not whether one individual is better qualified than another, but whether that individual is considered less qualified

not because of his or her own worth, but because of discrimination forbidden by Title VII. Hecht, supra, at 312. Put another way, although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable professionally than men.

C. Representative Parties' Claims Typical of the Claims of the Class (Rule 23 (a) (3)). -Kohn, whose academic qualifications are not disputed, claims that she was denied employment because of her sex. Therefore, her claim is exactly typical of the claims of the class.

D. Fair and Adequate Protection of the Class' Interests (Rule 23 (a) (4)). -Kohn is represented by counsel experienced in this area of the law and can be expected diligently to represent the interests of the class.

E. Generally Applicable Grounds for Injunctive or Declaratory Relief (Rule 23 (b) (2)). - As discussed above, the essential allegation, here, is that the firm discriminates against women applicants in its hiring procedure. If this allegation can be sustained - a matter on which we express no view - the class would be entitled to injunctive and declaratory relief to remedy past and prevent future discrimination. Accordingly, the requirements of Rule 23 are satisfied.

F. General Considerations. - Finally, the firm contends that, even if the elements of a class action are present, it would be inequitable to allow the suit to proceed in class form because Kohn's claims are devoid of merit.

As noted by defendant itself, the requirement that a plaintiff seeking a class action determination demonstrate likelihood of success on the merits has not been uniformly

accepted. *Sunrise Toyota, Ltd. v. Toyota Motor Co., Ltd.*, 55 F.R.D. 519, 534 (S.D. N.Y. 1972). Such a showing should not be necessary in Title VII suits, or should be required only to the extent of screening out cases which are clearly frivolous, because 'class actions are favorably viewed by the courts as a means of seeking redress for civil rights violations - the class action is the method which Congress has established for the vindication of the public interest through private actions.' [footnote omitted] *Gerstle v. Continental Airlines, Inc.*, [2 EPD ¶10,273] 50 F.R.D. 213, 216 (D. Colo. 1970) (footnote omitted). As the Court of Appeals for the Seventh Circuit said in *Bowe v. Colgate-Palmolive Co.*, [2 EPD ¶10,090] 416 F.2d 711, 719 (7th Cir. 1969):

'A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin.'

See also *Jenkins v. United Gas Corp.*, [1 EPD ¶9908] 400 F.2d 28, 33 (5th Cir. 1968); *Oatis v. Crown Zellerbach Corp.*, [1 EPD ¶9894] 398 F.2d 496, 499 (5th Cir. 1968). The firm does not cite any case which imposed a prerequisite demonstration of probable success on a civil rights suit (footnote omitted) in which a class demonstration was sought, and we decline to do so here."

Kohn v. Royall, Koegel & Wells, \_\_\_\_ F.Supp. \_\_\_\_ (S.D.N.Y. March 7, 1973) 5 EPD ¶8504. See also: Leisner v. New York Telephone Co., 358 F.Supp. 359, 371-373 (S.D.N.Y. 1973), where Judge Motley discussed the class aspects of a sex discrimination case, in depth. She said:

"Finally, the court holds that relief as to the class is appropriate at this time even though when the preliminary injunction motion was heard, the class action had not yet been certified. 'In the interim between the commencement of the suit as a class action and the court's determination as to whether it should be so maintained it should be treated as a class suit.' 3B J. Moore, Federal Practice ¶23.50 (2d ed. 1969).

Since the hearing was concerned primarily with general employment practices of the various traffic departments with respect to women seeking management level positions, rather than with reference to the Company's treatment of the named plaintiffs, the court believed that defendant has had an ample opportunity to be heard on the appropriateness of preliminary injunctive relief as to the class.

Plaintiffs move to bring this action on behalf of all other women in the traffic departments of New York Telephone Company in positions which the company defines as 'management' level. The number of women in the class is said by plaintiffs to be 2,235.

The court holds that a class action is maintainable since plaintiffs have satisfied the requirements of both Rules 23 (a) and 23 (b) (2):

- (a) The class is so numerous that joinder of all members is impracticable. R.23 (a) (1).  
The size of the class plaintiffs seek to represent makes it clear that joinder would be impracticable.
- (b) There are questions of law or fact common to the class. R.23 (a) (2).  
The basic factual and legal question common to the claims of each member of the proposed class is whether defendant has a policy of discriminating against women or utilizes criteria which have this effect with respect to certain management-level positions within its traffic departments.



Defendant argues however, that its: 'Traffic Department is in reality a collection of a large number of geographical administrative units located throughout the State of New York. There is no executive of the Company or small centralized group which administers a Traffic Department. The Company is organized into a number of Territories and Areas which are in turn subdivided into Traffic Departments, Divisions and Districts which cover the State. Personnel decisions with respect to hiring and promotions are diffused. . . .'

However, even if different personnel may be responsible for hiring and promotional policies in the various traffic departments and divisions, there is the common question of law and fact whether women situated in the various departments have been discriminated against on the basis of their sex by agents of the Telephone Company.

- (c) The claims of the representative parties are typical of the class. R. 23 (a). This pre-requisite merely states in other words the requirements of R. 23 (a) (1), (a) (2), and (a) (4). See 3B J Moore, Federal Practice ¶23.061-1 (1971 Supp.). It does not mean that the claims of the representatives must raise identical questions of law and fact with those raised by the claims of the rest of the class. Rule 23 (a) (1) clearly indicates that one common question of law or fact can be sufficient if the other pre-requisites are satisfied. Nor is it fatal if some members of the class might prefer not to have violations of their rights remedied. See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 37 (2d Cir. 1968).

- (d) The representatives will fairly and adequately protect the interest of the class. R. 23 (a) (4). The interest of the named plaintiffs are essentially co-extensive with those of the other class members. They all share a statutorily defined interest in not being discriminated against on the basis of their sex. While different members of the class may be interested in different jobs and may have varying qualifications for the jobs they seek, these factors can be considered in individual proceedings to determine appropriate relief necessary to correct past wrongs.

Moreover, the interests of the representatives must not be antagonistic to those of the rest of the class. See *Hansberry v. Lee*, 311 U.S. 32 (1940). Defendants argue that there is an inherent conflict of interest with respect to plaintiffs' requests for promotions and back pay:

Even if it were shown that a male had unlawfully been hired at a higher job level or promoted to a vacant job in preference to more qualified women, the Court must decide which member of the proposed class would have received the higher level job but for the discrimination. . . .

The named plaintiffs and absent members of the proposed class would thus be competing for the available higher positions. . . .

However, defendant concedes that the representatives may be able to represent the class adequately with respect to the request for general injunctive relief.

There can be little doubt that individual proceedings will be necessary to decide to what relief each member is entitled should the court find that defendant has acted illegally. The court has discretion at a later time to sever the claims for individual relief from the claim for general injunctive relief pursuant to R. 23 (c) (4) and 23 (d).

While the adequacy of the numerical representation should be considered - in this case the representative parties are but a minute proportion of the proposed class - size alone should not be a determinative criterion. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1971); 3B J. Moore, *Federal Practice* ¶23.07 [4] (2d ed. 1969). It seems obvious that "the quality of the representation is more important than numbers. . . ." C. Wright, *Federal Courts* §72 (1970).

Instead, one of the most important factors in deciding the adequacy of the representation is whether the party's counsel is ". . . qualified, experienced and generally able to conduct the proposed litigation." *Eisen*, supra, at 563.

Counsel has had extensive experience in sex and race discrimination cases. (footnote omitted) Moreover, the court has observed and the record will reflect the skill of plaintiffs' counsel in the proceedings already completed in this action.

The party opposing the class has acted or refused to act on grounds generally applicable to the class as a whole. R. 23 (b) (2). That rule has been used most frequently in civil rights cases where, as here, it is alleged that a defendant has discriminated against the members of the class on the basis of their race or sex.

Plaintiffs seek general injunctive relief on behalf of the class and it seems clear that, if the court should find that defendant has discriminated against members of the class, general injunctive relief barring discrimination against members of the class would be appropriate. Therefore, the requirement of R. 23 (b) (2) that ". . . final injunctive relief or



corresponding declaratory relief will be predominant. The comments to R 23 (b) (2) make it clear that requests for individualized relief will not preclude class certification: 'The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.' Committee Note of 1966 to Rule 23 (b) (2). (Emphasis added). Norwalk CORE, supra, does not stand for the proposition that a 23 (b) (2) class action cannot concern itself with individualized relief. Rather, in holding that the plaintiffs' complaint did not request '...ultimately that the Court concern itself with the particular circumstances of each displacee's relocation.' The Second Circuit held that there were common questions of law or fact within the meaning of 23 (a) (2). The Court did not suggest that requests for individualized relief would preclude class action certification under Rule 23 (b) (2)." (Emphasis included).

See also: N.O.W. v. Bank of California, \_\_\_\_ F.Supp. \_\_\_\_ (N.D. Cal., December 14, 1972 and February 28, 1973) 5 EPD ¶8510;

In view of the foregoing discussion, Appellant respectfully submits that the action herein is a class in nature; and that the District Court's position, otherwise, is reversible error.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN SUMMARILY DISMISSING THE ACTION HEREIN ON THE GROUND THAT IT LACKED JURISDICTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED (42 U.S.C. §2000(e))

As in Johnson v. University of Pittsburgh, supra, "state action" and the jurisdiction invoked thereunder (pursuant to 28 U.S.C. §1343 (3) and (4) in conjunction with the Civil Rights Act of 1871 (42 U.S.C. §1983) and the Fourteenth Amendment to the United States Constitution) "is not [solely] dispositive of this case." This suit was also brought under the Civil Rights Act of 1964, 42 U.S.C. 2000(e) and the 1972 Amendments thereto (added by Public Law 92-261, approved March 24, 1972).

The Appellees contended in their Motion to Dismiss to the Court below that it had no jurisdiction over the Appellant's claims herein because those particular acts occurred before the 1972 Amendments to the aforementioned Act, which Amendment "struck out the exemption of [so-called] private institutions" and made it "unlawful to discriminate [against] an individual because of sex." Johnson v. University of Pittsburgh, supra.

It is apparent from the affidavit submitted by the Appellant in connection with and in opposition to the Appellees' Motion to Dismiss that, notwithstanding the fact that a majority of the acts complained of by the Appellant in her complaint

initially occurred prior to the 1972 Amendment, nevertheless she had filed timely university and state administrative proceedings which were continuing up to and beyond the date of the enactment of the 1972 Amendments. In effect, then, the acts complained of by the Appellant were continuing even after the '72 Amendments and were the subject of proceedings from which she was seeking redress for the alleged violation of her rights.

Accordingly, those actions were properly the subject of an administrative complaint to the Equal Employment Opportunity Commission (EEOC) which, as the Appellant's supplemental affidavit reflects, was timely filed with said agency, through her September 30, 1973 clarification letter to Lloyd Bell, after the 1972 Amendments were enacted.

This action was filed in this Court pursuant to a "Notice of Right to Sue" which was issued by the Equal Employment Opportunity Commission in Buffalo, New York, over the signature of Mr. Lloyd Bell, Regional Director of that office.

Mr. Bell indicated that the Appellant's Complaint, which was filed on September 23, 1973 was untimely but that a "Notice of Right to Sue" was still in order.

Said "Notice of Right to Sue" (a copy of which is attached to Appellant's initial Affidavit) was based on the Appellant's Complaint to the EEOC that she had been terminated from her position as an Assistant Professor of English in the English Department

at Syracuse University, effective June, 1971, in an arbitrary and capricious manner and based on arbitrary, capricious and sexually discriminatory policies and considerations.

Before filing her Complaint with the EEOC on September 23, 1973, the Appellant had diligently pursued her administrative remedies in the New York State Division of Human Rights. In addition, she had pursued her remedies through the University administrative structure and was continuing to pursue the same up to October, 1973; but was receiving no satisfaction in that regard.

Probable cause was found in the State Division of Human Rights; <sup>and</sup> after conciliation failed, an administrative hearing was held in this matter and an adverse ruling to the Appellant's position was eventually handed down.

The Appellant appealed that decision to the Appeal Board of the New York State Division of Human Rights and received an adverse decision therefrom.

At the same time, the Academic Freedom, Tenure and Professional Ethics Committee of the University Senate issued a report in January, 1973, after holding hearings in the Appellant's matter.

Said Committee found that the Appellant's dismissal had violated appropriate and required University and Departmental procedures and was without adequate consideration in basis.

The Appellant had filed her grievance with said Committee in April, 1971, pursuing her remedies through that administrative body diligently.

The delay in the issuance of said report was totally beyond the Appellant's control and was attendant to the delay inherent in that administrative procedure.

In April, 1973, the Department of English refused to act upon a request made of it to act upon the Senate Panel findings and reconsider her appointment to the faculty.

As late as October, 1973, the Chancellor of the University, Melvin Eggers, officially notified the Appellant that he was refusing to act upon the Senate Panel findings and reconsider her appointment to the faculty.

It must be understood that, if the Appellant had not been terminated arbitrarily and capriciously, the Senate Faculty would not have made its findings and the University would not have been required to reconsider the Appellant for appointment to the faculty.

In substance then, the Appellee University's failure in this regard related not to hiring the Appellant to a position at the University but rather dealt with the arbitrary termination from the position which she had previously held with the University for five years.

On September 30, 1973, the Appellant clarified her Complaint to the EEOC respecting the action of the University in April, 1973.

her initial Notice of Right to Sue was issued on September 27, 1973.

In December, 1973, the EEOC advised the Appellant that it was assuming jurisdiction of the Appellant's Complaint of September 30, 1973, relating to the failure of the University to act in April, 1973 pursuant to the requests made and based on the University Senate's findings.

As previously indicated heretofore and as Appellant's counsel pointed out in oral argument to the Court below, the April 30, 1973 action of the Appellee University was intricately involved with and connected to the Appellant's termination; if the latter had not occurred, the April 30, 1973 action (inaction) and the subsequent October, 1973 action (inaction) would not have occurred.

As Appellant's counsel pointed out at the oral argument on March 18, 1974 before the Court below, he had spoken with Mr. Lloyd Bell that morning about this matter. Mr. Bell indicated to Appellant's counsel, as the latter pointed out to the District Court, that, in all likelihood and in view of the federal court proceedings underway, Mr. Bell would issue another "Notice of Right to Sue," the EEOC having deferred the September 30, 1973 Complaint of the Appellant to the New York State Division of Human Rights, as it was required to do under law, and having reassumed its jurisdiction.



On March 27, 1974, the EEOC issued a "Notice of Right to Sue" letter to the Appellant, over the signature of Lloyd Bell, as he had indicated such would be issued.

The Appellant submitted a Supplemental Affidavit to the District Court advising it of the same. See: Appendix to this Brief.

Notwithstanding the same, the Court below rejected jurisdiction stating:

"The remaining claims of jurisdiction, under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. and Executive Orders 11246 and 11375, simply from my review do not confer jurisdiction under the allegations contained in the complaint. *Bradford v. Peoples Natural Gas Company, Inc.*, 60 F.R.D. 432, 436 (W.D. Pa. 1973).

I find that the time of the alleged act of discrimination at the latest is June, 1971, the effective date of termination between plaintiff and Syracuse University. Prior to March 24, 1972, 42 U.S.C. §2000e - 1, specifically exempted an 'educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution,' and thus this alleged act of discrimination being prior to March 24, 1972 could not come within the ambit of this Act. *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 395 n. 1 (4th Cir. 1973), rev'd on other grounds 94 S.Ct. 791 (1974), [cert. gr. 411 U.S. 947 (1973)] *Johnson v. University of Pittsburgh*, 359 F.Supp. 1002, 1007 (W.D. Pa. 1973); *Hill-Vincent v. Richardson*, 359 F.Supp. 308 (N.D. Ill., E.D. 1973); *Walker v. Kleindienst*, 357 F.Supp. 749 (D.C. 1973).

The lack of retroactive application is not the only bar to jurisdiction under the terms of §2000e. Plaintiff has also failed to meet the time limits prescribed for filing

her complaint with the EEOC. This failure is adequately explained in a letter from Lloyd G. Bell, District Director, EEOC (September 27, 1973), appended to plaintiff's affidavit of March 18, 1974. A timely filing is a jurisdictional prerequisite to a suit in a United States District Court. *Choate v. Caterpillar Tractor Company*, 402 F.2d 357, 359 (7th Cir. 1968); *Austin v. Reynolds Metal Company*, 327 F.Supp. 1145, 1148 (E.D. Va. 1970); *Williams v. Local No. 19, Sheet Metal Wkrs. Int'l Ass'n*, 59 F.R.D. 49, 52 (E.D. Pa. 1973); *Washington v. Aerojet-General Corp.*, 282 F.Supp. 517, 519-520 (C.D. Calif. 1968). These time limitations are specific and clear and failure to follow them defeats later suit under the Act."

Appellant submits that the District Court's position is erroneous and that the Act in the circumstances herein is clearly retroactive; but that even if it is not, the Court had jurisdiction under Title VII, pursuant to the Notice of Right to Sue letter issued in 1973 which incorporated therein the independent act(s) of discrimination which occurred in the spring of 1973 and for which the Appellant filed a timely Complaint to the EEOC office in Buffalo on September 30, 1974. Speaking to the retroactively issue, it is apparent that the weight of authority favors such a position.

In Walker v. Kleindienst, 357 F.Supp. 749 (D.C.D.C. 1973), the Plaintiff therein, a Black female employed by the United States Department of Justice, was denied a job promotion.

She alleged both race and sex discrimination as the reason that she was not promoted. The threshold question was whether the plaintiff had stated a claim under Title VII as amended in order to invoke the jurisdiction of the federal court. The



Government contended that the Act did not apply because the alleged acts of discrimination had occurred prior to the 1972 Amendments.

In holding that the Act was retroactive, the Court stated:

"The threshold question is whether plaintiff has stated a claim under Title VII, as amended, over which this Court has jurisdiction. The Government contends that the Act does not apply to this case since the alleged acts of discrimination occurred prior to the time Title VII was amended to cover federal employment. The Government maintains this position despite the fact that the Civil Service Commission appeal and this suit were filed well after the Amendment's March 24, 1972 effective date. Plaintiff argues that the Act is retroactive.

\* \* \*

Based on the reasons set forth below, this Court holds that Title VII, as amended, covers charges of pre-act discrimination in federal employment, whether such charges were pending with the Civil Service Commission or pending at some other stage in the remedial process on March 24, 1972. The Court bases this holding on the fact that the 1972 Act is a remedial statute and, accordingly, additional arguments advanced by plaintiff need not be addressed here. [footnote omitted].

\* \* \*

The 1972 Act is clearly remedial. The Act fits the classic definition of legislation which affords a remedy or facilitates remedies already existing for the enforcement of rights and redress of injuries. 2 Southernland, Statutory Construction, Sec. 3402 (3rd Ed. 1972). Furthermore, it is civil rights legislation, traditionally considered remedial. 10. Vol. v, Sec. 7217 (1972 Cum. Supp.). The general rule of construction is that a remedial statute shall be so construed as to make it effect its evident purpose and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied. The 1972 Act should be construed to cover pending charges of discrimination in federal employment since the statute takes away no substantive right, but . . . simply changes the tribunal

that is to hear the case.<sup>1</sup> Hallowell v. Boardman, 394 U.S. 586, 598, 30 S.Ct. 202, 61 L.Ed. 2d 419 (1969). See also Thorpe v. Housing Authority of the City of Durham, 394 U.S. 520, 529 S.Ct. 516, 21 L.Ed. 2d 474 (1969); Turner v. United States, 410 U.S. 369, 377 (1967) (Cir., 1969) for the rule when a case is pending judicial determination. Its applicability to pending cases is also supported by the fact that the 1972 Act is amendatory, affecting procedural remedies and should, therefore, apply to all cases pending at the time of its enactment unless some vested right would be impaired as a result. 1A Southerland, Sects. 22.01, 22.36. The federal government has no license to discriminate and, consequently, no vested right is affected. The Court finds that it has jurisdiction to entertain plaintiff's claim." (Emphasis added). 4

Id. at pages 750-752.

Equal Employment Opportunity Commission v. Eagle Iron Works, 367 F.Supp. 817, 819-820 (D.C. Iowa, 1973) cites Walker, supra, in support of retroactive application of Title VII in a patterns and practices action filed by EEOC pursuant to Title VII:

"Prior to the amendment of the Civil Rights Act of 1964 by the Equal Employment Opportunity Act of 1972, the plaintiff in this case, the EEOC, was powerless to sue eo nomine

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<sup>1</sup> District Judge Smith did acknowledge the existence of a contrary position but rejected it as the correct position.

to secure compliance with Title VII. Eagle argues that it is a violation of its right to due process to allow the EEOC to sue it now, that application of 1972 legislative enactment to a 1968 grievance is prohibited by the 5th amendment and the ex post facto clause of Article I, section 9 of the Constitution. At the heart of Eagle's contention is its claim that Title VII is essentially punitive in nature. See *Burgess v. Salmon* (1878), 97 U.S. (7 Otto) 381, 384-385, 24 L.Ed. 1104. This characterization ignores a substantial body of law that has reached the conclusion that the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 are remedial in purpose and are to be given the broadest possible interpretation consistent with their benevolent purpose. See, e.g., *Perham v. Southwestern Bell Telephone Co.* (8th Cir., 1970), 433 F.2d 421, 425; *Howe v. Colgate Palmolive Co.* (7th Cir., 1972), 416 F.2d 711, 719-721; *Walker v. Rheinhardt* (D.D.C., 1973), 357 F.Supp. 749. (Emphasis added).

Eagle also argues that the retroactive application of the 1972 statute is impermissible because it deprives an individual of vested fundamental rights or property interests. See *Chase Securities Corp. v. Donaldson* (1945), 325 U.S. 304, 311-316, 65 S.Ct. 1137, 89 L.Ed. 1628; *Campbell v. Holt* (1885), 115 U.S. 620, 628-630, 6 S.Ct. 209, 29 L.Ed. 483. Especially apposite here is the following language from *Campbell*:

There are numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action . . .

In all this class of cases the ground taken is that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of

of public policy, been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable. 115 U.S. at 627, 6 S.Ct. at 213.

The point emphasized by the quoted excerpt from Campbell is that, if there exists a right, a subsequent legislative enactment creating a remedy for the deprivation of or interference with that right is constitutionally unobjectionable. Defendant Eagle misconstrues the statutory scheme and fails to recognize the distinction between unlawful conduct and a cause of action to remedy that conduct.

Retroactive application is supported by the plain statutory language of §14 of the 1972 Act, Pub.L. No. 92-261, §14, which provides: 'The amendments made by this Act to [42 U.S.C. §2000e-5] shall be applicable with respect to charges pending with the Commission on [March 24, 1972] and all charges filed thereafter.' Since there is agreement that the complaint which triggered the instant suit was pending on March 24, 1972, it is evident that Congress intended §2000e-5 to apply to this case. By allowing the EEOC to proceed, therefore, the Court is doing nothing more than effectuating a clearly expressed legislative intent.

Racially oriented employment discrimination has been prohibited since the effective date of the 1964 Act, July 2, 1965. The 1972 Act requires that an analogy be drawn comparing the provision allowing the EEOC to sue in its own behalf to a Congressional attempt to provide a remedy for a preexisting right of the type referred to in Campbell, supra. So viewed, allowing the EEOC to avail itself of the provisions of the 1972 Act poses no constitutional problems. See Walker v. Kleindienst, supra."

See also: Henderson v. Defense Contract Administration Services



Region, New York, 370 F.Supp. 180, 182-183 (S.D.N.Y. 1973) where

District Judge Pierce stated:

"The plaintiff, on the other hand, argues that federal employees have long had the right not to be discriminated against on the basis of race by their federal employer and that the section in question merely provides a new remedy for this long existing right. The limited case law on this point is in conflict. [footnote omitted]."<sup>5</sup>

The Court agrees with plaintiff's position that federal employees have long had the right to be free from job discrimination. Thus for many years prior to March 24, 1972 a series of Executive Orders provided safeguards to federal employees against racial discrimination. The earliest one relevant here is E.O. 9980, July 26, 1948, 3 C.F.R. 720 (1943-48 Comp.). There followed E.O. 10590, January 18, 1955, 3 C.F.R. 237 (1954-58 Comp.); E.O. 10925, March 6, 1961, 3 C.F.R. 448 (1959-63 Comp.); E.O. 11246, September 24, 1965, 3 C.F.R. 339 (1964-65 Comp.), and E.O. 11478, August 8, 1969, 3 C.F.R. 803 (1966-70 Comp.). All of these Order clearly establish a policy against racial discrimination in Federal employment and all prescribe procedures for processing of discrimination complaints varying somewhat from Order to Order. Moreover, section 7151 of Title 5 of the United States Code declares it to be the official policy of the United States 'to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin.' (emphasis added).

\* \* \*

In the light of this brief background, the Court concludes that the 1972 Act is a remedial statute which affords a remedy, or approves a remedy,

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<sup>5</sup>The footnote cites those cases which enunciate and approve the retroactive doctrine, including Walker.

facilitate[] remedies already existing for the enforcement of rights and the redress of injuries. . . .  
2 J. B. Sutherland, Statutory Construction § 3402  
(3rd ed. 1947). Further, the 1972 Act is clearly  
modern social legislation and such statutes are  
generally regarded as remedial in nature. 3 J. B.  
Sutherland, Statutory Construction § 5702 (1973  
Cum. Supp.). It is a well settled rule of construc-  
tion that "a remedial statute shall be so construed  
as to make it effect its evident purpose and if  
the reason of the statute extends to past trans-  
actions, as well as to those in the future, then  
it will be so applied." Walker v. Aieindienst,  
357 F.Supp. 749, 751 (D.D.C. 1973). The 1972  
Act simply added another forum or tribunal in which  
federal employees may redress their right not to  
be discriminated against in employment and reflects  
a Congressional policy that the right of federal  
employees against discrimination will be better  
protected if they are able to sue in federal  
court if dissatisfied with the agency determina-  
tion.

The Court therefore concludes that it has jurisdiction to entertain plaintiff's claim." (Emphasis added).

In Johnson v. University of Pittsburgh, supra, a non-tenured female professor in the Department of Biochemistry of the School of Medicine was discharged. The discharge was decided upon in 1971, verbal notification was given in January 1972 followed by a letter dated March 8, 1973.

The Court followed Walker and applied Title VII retroactively. It stated in this regard:

"In Section 14 of the 1972 amendments, there  
is a provision that the new law shall apply to  
employees who were employed by the Federal Government  
on September 8, 1964, the effective date of the Act, and to

cases where the charges were pending on the effective date of the Act and to all charges filed thereafter. The Act, however, is silent with respect to section 722 the removal of the educational exemption.

We hold that the 1972 amendments cannot be rendered mandatory by making a decision before March 24, 1972, to become effective thereafter as a discriminatory discharge and refusal to grant tenure thereafter is as much a violation of the Act as any other sexual discrimination. It will be noted that it is an unlawful employment practice 'to discriminate as to any individual because of sex.' The discharge and refusal of tenure on June 30, 1973, will, under the circumstances of this case, amount to such discrimination. We cannot believe that Congress intended that such action could be effectual in violation of the plain mandates of the Act. The Supreme Court has held that the purpose of the Civil Rights Act is to achieve equality in employment opportunities, and remove barriers which operated in the past. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). In Walker v. Kleindienst, 357 F.Supp.749 (D.C. 1973) it was held that the 1972 amendments are remedial in nature and cover charges of discrimination pending before the Civil Service Commission or which were at some other stage of the remedial process on March 24, 1972 when the amendments took effect. The 1972 amendments also extended Title 7 to cover discrimination in Federal employment and present substantially the same situation as to it as the extension to an educational institution. In that case, the Department of Justice attempted to discharge plaintiff on March 24, 1972, and the court held that it has jurisdiction under the amendments since proceedings were pending at that time. We are aware of the decision in the Northern District of Illinois, Hill-Vincent v. Richardson, 357 F.Supp. 303 (1973) which seems to hold to the contrary but in that case it is noted that the discriminatory discharge had taken place

apparently before the effective date of the 1972 amendment. In any event, we follow Walker v. Kleindienst, supra, as being the most persuasive opinion in this matter of apparent first impression." (Emphasis added).

Id. at page 1007.<sup>6</sup>

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<sup>6</sup>Interestingly and significantly, many courts have held that evidence of activities of Defendants prior to the passage of Title VII of the 1964 Civil Rights Act was not necessarily irrelevant and, in fact, was admissible into evidence. See: Clark v. Porter, 296 F.Supp. 40, 56-58 (D.C. Ala. 1968); Clark v. Local 189, United Papermakers and Paper Workers, 282 F.Supp. 39, 44-45 (D.C. La. 1968) where the Court held that where a seniority system acts to perpetuate discrimination, despite its development prior to the passage of the Act, it is in violation of the Act; Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 516-519 (D.C. Va. 1968); United States v. Chesapeake & Ohio Railroad Co., 471 F.2d 582 (Ct. of Appeals, D.C. 1972), Cert. denied 411 U.S. 936, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1972); Evans v. Local Union 2127, International Brotherhood of Electrical Workers, AFL-CIO, 313 F.Supp. 1354 (D.C. Ga. 1969); Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Sims v. Sheet Metal Workers International Association, Local Union #65, 353 F.Supp. 22 (D.C. Ohio, 1972); United States v. Georgia Power Co., 474 F.2d 906 F.2d 906 (5th Cir. 1973).



Moreover, the untimeliness referred to in the initial "Notice of Right to Sue" letter and discussed by the Court below related to administrative convenience for undertaking its own investigation and not to the propriety of issuing a Notice of Right to Sue.

This is particularly so in view of the fact that the Appellant was not sitting idly by during the intervening period of time between the initial discriminatory act and the filing of the initial Complaint with the EEOC.

If the Appellant had filed a "timely" Complaint with the EEOC immediately after the enactment of the 1972 Amendment, the EEOC would have been compelled to defer to the New York State Division of Human Rights in any event, a forum wherein the Appellant was actively involved at the time of the enactment of the Amendment.

Accordingly, it seems foolish to require the Appellant to file a "timely" Complaint with the EEOC when, if she had done so, the matter would have just been referred back to the area wherein she was already addressing herself to the issues.

Furthermore, the Appellant was actively pursuing her remedy in the University administrative structure and was being rejected in that regard even up to and after the encumbered "Notice of Right to Sue" letter was issued.

In point of fact, the Appellant did file a timely Complaint with the EEOC on September 30, 1974 (after receiving the encumbered Notice of Right to Sue) based on the failure of the Tenure Committee of the Department of English to act in April, 1973 in view of the University Senate's earlier finding (in January, 1973) of impropriety in the Appellant's termination.

In view of Appellant's Complaint to the EEOC, immediately after receiving her encumbered "Notice of Right to Sue" in September, 1973, the actions (inaction) of the Appellee University in April, 1973 and October, 1973, and the unencumbered "Notice of Right to Sue" which was issued by the EEOC, after it had assumed jurisdiction, appropriately deferred to the State, and then reassumed jurisdiction, and in view of the fact that the actions (inaction) of the Appellee University in April, 1973 and October, 1973 could not have and would not have occurred if the Appellant had not been terminated arbitrarily and capriciously and in violation of required University procedures and without consideration in basis, the District Court, with knowledge of the same, clearly had jurisdiction of this matter; and its holding otherwise was reversible error.

In view of the foregoing authority, in view of the fact that it has been illegal for universities within the State of New York to discriminate against women, in admissions and in employment practices (under the Education Law and the Human Rights Law of the State of New York) prior to the enactment of the 1972 Amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e)), in view of the fact that the Appellant was diligently pursuing her state administrative and university internal grievance procedures up to and after the enactment of the Amendment, and in view of the fact that discriminatory actions were alleged to have been taken against the Appellant by the Appellee University subsequent to the enactment of the Amendment, it is evident that the District Court precipitously dismissed this action on jurisdiction grounds under Title VII; and that this Court should reverse accordingly.

## CONCLUSION

In view of the foregoing arguments and the discussion related thereto, Appellant respectfully submits that this Honorable Court reverse the decision and order of the Court below and remand the cause back to it with direction to assume jurisdiction under Title VII of the 1964 Civil Rights Act as amended and consider evidence on the merits of the substantive claims thereunder as well as evidence on the jurisdictional question related to 42 U.S.C. §1343 (3) and (4) in conjunction with the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 (the Civil Rights Act of 1871)

Respectfully submitted,

/s/ James I. Meyerson

JAMES I. MEYERSON  
1790 Broadway - 10th Floor  
New York, New York 10019  
(212) 245-2100

Attorney for Appellant

CERTIFICATE OF SERVICE

James I. Meyerson, attorney for the Appellant, certifies that on the 27th day of September, 1974, I did serve a copy of the foregoing Brief on the Appellees by mailing the same first class, postage prepaid to their attorneys: Bond, Schoeneck & King, One Lincoln Plaza, Syracuse, New York, by David Sexton, Esq.

Respectfully submitted,

/s/ James I. Meyerson

JAMES I. MEYERSON  
1790 Broadway - 10th Floor  
New York, New York 10019  
(212) 245-2100

Attorney for Appellant